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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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May 20, 1980

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Constitutional Provisions	3
State Statutes	3
Questions Presented	5
Statement of the Case	6
Reasons for Granting the Writ	12
1. The State Agencies and Courts Frustrated Petitioners' Procedural Due Process Rights By Denying Discovery and a Hearing on Essential Elements of Their Constitutional Claims	12
2. The Arbitrary and Discriminatory Application of the Tax Law Violated the Equal Protection and Due Process Clauses of the United States Constitution	16
3. In Excluding Circuses from the Exemption for "Dramatic or Musical Arts Performances" the Statute Deprives Petitioners of Their Constitutional Rights of Free Speech, Due Process and Equal Protection	18
CONCLUSION	20
APPENDIX	
Orders and Memorandum Opinions of the Supreme Court of the State of New York, New York County, dated March 23, 1976	1a
Opinion of the Supreme Court of the State of New York, New York County, dated August 10, 1977.	4a
Opinion of the Supreme Court of the State of New York, New York County, dated April 18, 1978	17a
Order and Judgment of the Supreme Court of the State of New York, New York County, dated May 23, 1978	19a
Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated November 20, 1979	27a
Notice of Appeal to the New York Court of Appeals, dated December 26, 1979	28a

PAGE

Order of the New York Court of Appeals, dated February 20, 1980 ..... 30a

Excerpts from Complaint 31a

Excerpts from Answer of New York State Tax Commission 35a

Excerpts from Affidavit of Robert Thrun 36a

Affidavit of Kenneth Feld 40a

Affidavit of William Pruyn 43a

Affidavit of Leonard Duane Easter 45a

Affidavit of Bill Bradley 47a

Letter Ruling, dated August 25, 1965, of Edward H. Best, Counsel, New York State Department of Taxation and Finance, exempting ice show from admissions tax 49a

TABLE OF AUTHORITIES

Cases

	Page
Brown v. *Western Ry. of Alabama*, 338 U.S. 294 (1949)	18
Charlestown Ass'n v. *Alderson*, 324 U.S. 182 (1945)	14
City of Mobile v. *Bolden*, 48 L.W. 4436 (April 22, 1980)	14
Endicott-Johnson Corp. v. *Smith*, 266 U.S. 291 (1924)	14
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	15
Henry v. *Mississippi*, 379 U.S. 443 (1965)	13
Herbert v. *Lando*, 441 U.S. 153 (1979)	14, 15
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952)	19
Mackey Telegraph Co. v. *Little Rock*, 250 U.S. 94 (1919)	14
Merchant v. *Pennsylvania Ry. Co.*, 153 U.S. 380 (1893)	14
Metromedia, Inc. v. *New York State Tax Commission*, (Sup. Ct. Albany Co., Jan. 12, 1979) (Pitt, J.)	9, 19
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928)	18
New York Times Company v. *Sullivan*, 376 U.S. 254 (1964)	15
O'Brien v. *Skinner*, 414 U.S. 524 (1974)	20
Pennoyer v. *Neff*, 95 U.S. 714 (1877)	14
Roe v. *Wade*, 410 U.S. 113 (1973)	20
Rowley v. *Chicago N.W. Ry.*, 293 U.S. 102 (1934)	14
Snowden v. *Hughes*, 321 U.S. 1 (1944)	14
Speiser v. *Randall*, 357 U.S. 513 (1958)	19
Sugarman v. *Dougall*, 413 U.S. 634 (1973)	20
Turpin v. *Lemon*, 187 U.S. 51 (1902)	14
United States v. *Nixon*, 418 U.S. 683 (1974)	15
United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973)	20
Ward v. *Love County*, 253 U.S. 17 (1920)	18
Winters v. *New York*, 333 U.S. 507 (1948)	19

Constitutional Provisions

	Page
Constitution of the United States:	
Article I, Section 8, Clause 3	*passim*
First Amendment	*passim*
Fourteenth Amendment, Section 1	*passim*

Statutes

United States Code:	
Title 28, Section 1257(3)	3
New York Statutes:	
Section 1101 (d)(5)(1965)	4
Section 1105(f)(1)(1965)	3
Section 1116(d)(2)(B)(1965)	4
Administrative Code of the City of New York:	
Section A46-1.0(d)(5)(1965)	5
Section A46-2.0(f)(1)(1965)	4
Section A46-7.0(d)(2)(B)(1965)	5
Former Administrative Code of the City of New York:	
Section G46-1.0(3)(a)(enacted 1954, repealed 1965)	9

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No. _____

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Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

The petitioners, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. (the "Circus") and Ruth F. Lutzky, a taxpayer and patron of the Circus suing on behalf of herself and all other Circus patrons and taxpayers similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered in this proceeding on November 20, 1979.

The court affirmed without opinion the orders and judgment of the New York State Supreme Court, County of New York, (1) denying petitioners discovery of relevant documents in respondents' possession concerning the enactment, appli-

cation and enforcement of the New York State Tax Law to tax admissions charges for the Circus while granting statutory and administrative tax exemptions to similar arena shows and entertainments of a "musical, dramatic or choreographic" nature; and, after denying discovery, (2) granting summary judgment, on the merits and on the basis of the pleadings alone, without granting any hearing or allowing discovery of any evidence on the constitutional issues raised by petitioners. These issues concern respondents' violation of petitioners' due process, equal protection, First Amendment and commerce clause rights under the Constitution of the United States by enacting, applying, and selectively enforcing the New York State admissions tax law against the Circus and its patrons while exempting from said taxes ice shows, dramatic plays, Broadway musicals, classical and rock concerts, motion pictures and even a competitor's wholly intrastate circus.

OPINIONS BELOW

No opinions were rendered by the Appellate Division of the Supreme Court, First Judicial Department, or by the Court of Appeals of the State of New York.

The opinion of the New York State Supreme Court, New York County (Postel, J.), dated March 23, 1976, denying discovery of respondents' files, is not reported. It is reprinted in the appendix hereto, p. 1a, *infra* (hereinafter cited as A. .)

The opinion of the New York State Supreme Court, New York County (Postel, J.), dated August 10, 1977, granting summary judgment to respondents, is not reported. It is reprinted in the appendix hereto. (A. 4a.)

The opinion of the New York State Supreme Court, New York County (Kirschenbaum, J.), dated April 18, 1978, on reargument, is not reported. It is reprinted in the appendix hereto. (A. 17a.)

JURISDICTION

The order and judgment of the Appellate Division of the New York State Supreme Court, First Department, which unanimously affirmed the order and judgment of the New York

State Supreme Court, New York County, dated May 23, 1978, was filed on November 20, 1979 (A. 27a). Petitioners duly appealed, and in the alternative sought leave to appeal, to the New York Court of Appeals. On February 20, 1980, that Court dismissed the appeal as of right upon the ground that "no substantial constitutional question is directly involved" and denied the motion for leave to appeal. This petition for certiorari is filed within ninety days of the order dismissing the appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The relevant provisions of the United States Constitution are: Amendment Fourteen, Section 1, the Due Process and Equal Protection Clauses; Amendment One, the Freedom of Speech Clause; and Article I, Section 8, clause 3, the Commerce Clause.

STATE STATUTES

A. *New York State Tax Law,* Article 28, entitled "Sales and Compensating Use Taxes" (enacted by Laws of 1965, ch. 93, effective August 1, 1965):

1. New York State Tax Law §1105, entitled "Imposition of sales tax", subd. (f)(1):

> ". . . *there is hereby imposed* and there shall be paid *a tax of four percent upon:*
>
> . . .
>
> "(f)(1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the state, except charges for admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . ." (Emphasis added.)

2. New York State Tax Law §1101, entitled "Definitions", subd. (d)(5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic* or *musical performance.*" (Emphasis added.)

3. New York State Tax Law §1116, entitled "Exempt organizations", subd. (d)(2)(B):

> "(2) The exemption provided in paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:
>
> . . .
>
> (B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation."

B. *Administrative Code of the City of New York,* Chap. 46, Title A, entitled "Sales and Related Taxes", (enacted by Local Law 1965, No. 73, July 22, 1965, effective August 1, 1965):[1]

1. Administrative Code §A46-2.0, entitled "Imposition of sales tax", subd. (f)(1):

> ". . . there is hereby imposed within the City of New York and there shall be paid a tax upon the receipts, rents, dues and charges specified in the following subdivisions (a), (b), (c), (d), (e), and (f) at the rate of four percent . . .
>
> "(f)(1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the City of New York, except charges for* [admissions] *admission to* race tracks, boxing, sparring or

[1] Effective June 10, 1975, after this action was commenced, the City's sales tax (including the admissions tax) was suspended by Tax Law §1210(f) and replaced by a State tax imposed by Tax Law §1107 at the rate of four percent and identical, in relevant part, to the taxes imposed by Tax Law §1105. This State tax is to terminate upon payment of Municipal Assistance Corporation obligations, and the City tax is then to resume. (Tax Law §§1107(d) and 1210(i).)

wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . ." (Emphasis added.)

2. Administrative Code §A46-1.0, entitled "Definitions", subd. (d)(5):

"(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic or musical performance.*" (Emphasis added.)

3. Administrative Code §A46-7.0, entitled "Exempt organization", subd. (d)(2)(B):

"(2) The exemption provided under paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:

. . .

"(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation . . ."

QUESTIONS PRESENTED

1. Whether State and City tax officials and the courts of the State of New York, by denying persons subject to the State and City sales taxes the right to discovery and a hearing on the issue of discriminatory purpose and intent and thus any access to the only evidence on that crucial element of their constitutional claims, and by then using the failure to produce such evidence to justify summary dismissal of those claims, violate the guarantee of procedural due process under the Fourteenth Amendment of the United States Constitution?

2. Whether arbitrary application and selective enforcement of the New York State Tax Law and the Administrative

Code of the City of New York to tax admissions to performances of the Circus while exempting other "live dramatic, choreographic or musical performances," absent a showing of any rational basis related to the purpose of such exemption, violate the Due Process and Equal Protection clauses of the United States Constitution?

3. Whether a State tax law's exclusion, without rational basis, of all circuses from an exemption for "dramatic or musical arts performances," on its face violates the constitutional rights of the Circus to free speech, due process and equal protection under the First and Fourteenth Amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, clause 3 of the United States Constitution?

STATEMENT OF THE CASE

1. The Complaint

Petitioners' complaint sought a declaratory judgment "that if the Tax Law requires the Ringling Bros. Circus to collect state and city sales tax on admission charges from its patrons, while exempting therefrom admission charges for other live dramatic, choreographic and musical performances, the Tax Law on its face deprives [petitioners] of the equal protection of the laws in violation of . . . Amendment XIV, Section 1 to the Constitution of the United States, and that "the defendant State Tax Commission's arbitrary and discriminatory application of the Tax Law deprives [petitioners] of the equal protection of the laws in violation of . . . Amendment XIV, Section 1, to the Constitution of the United States." (Complaint ¶¶ 18(c), 18(d)).[2]

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[2] Since the fall of 1972 the Circus has not paid any admissions tax to respondents but, pursuant to Tax Law §1137(d), and with the consent of respondents, has posted a surety company bond. The bond, issued by the St. Paul Fire and Marine Insurance Company, is in the amount of One Million Six Hundred Sixty-One Thousand Three Hundred Twenty-Three ($1,661,323) Dollars plus accrued interest, and secures payment of any taxes which may be ultimately determined to be due.

2. The Undisputed Facts Regarding the Circus

(a) *The Circus's general form and content*

Ringling Bros.-Barnum & Bailey Circus, "The Greatest Show on Earth", has been an American institution for one hundred and ten years. The Circus's productions use hundreds of performers and animals and are a meld of dramatic, choreographic and musical elements. The individual acts and the gala production numbers are elaborately staged, choreographed, lighted and costumed. Continuously throughout the Show there is a live music program of over 200 compositions including songs sung by the ringmaster. The music is arranged for each production by a professionally employed musical director and performed by the fourteen-piece Circus band. (A. 44a.)[3]

The Circus has co-producers, a director, and a large production staff including the associate director, costume designer, assistant costume designer, aerial director, scenic consultant and lighting supervisor. Each year the Circus's choreographer, together with its co-producers, director, musical arranger and costume designers, create five elaborate production numbers for the upcoming year's new production. (A. 47a.) They include choreographed dance routines using props and stages,[4] employing trained dancers (many with previous experience in Broadway shows), specially arranged musical scores and spectacular processions in which virtually the entire huge Circus cast of over 150 artists participates. (A. 48a.)

The Circus performers are collectively known as "Artists" under the terms of the Circus's labor agreements and are represented in collective bargaining by the American Guild of Variety Artists (AGVA), AFL-CIO, which represents variety

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[3] Over the years, a great deal of original music has been composed for the Circus. In 1942, Igor Stravinsky wrote an "Elephant Ballet" for the Circus; Deems Taylor wrote a musical suite entitled "Through the Looking-Glass"; and other compositions have been written by Victor Young, Henry Sullivan, Richard Barstow and many others.

[4] The Circus's choreographer, Bill Bradley, has worked throughout the entertainment industry. With the Circus's former director, Richard Barstow, he staged the shows at New York City's Latin Quarter; he also worked in the theatre with the internationally famous choreographer Jerome Robbins and others.

performers in musical and variety shows presented at Radio City Music Hall, on Broadway and other musical and variety presentations that the respondents treat as tax exempt. The musicians in the Circus Band are all members of the American Federation of Musicians.

(b) *Scholarly and critical views of the Circus's dramatic, choreographic and musical character*

Petitioners submitted the sworn statements of officers and employees of the Circus attesting to its elaborate production requirements and its choreographic, musical and dramatic elements. (A. 40a-44a, 46a-48a.) Petitioners also submitted numerous published reviews of the Circus by the drama critics of major American newspapers and theatrical periodicals, and an essay by a Ph. D. candidate at the New York University Drama School summarizing the academic and historical view of the circus as theater.

By contrast to the extensive showing made by petitioners, respondents submitted only a self-serving affidavit of the City of New York's attorney timing the various Circus acts and offered no expert analysis of the Circus or any independent opinion to rebut petitioners' showing that the Circus is a dramatic, choreographic and musical performance.

3. Petitioners' Unrebutted Showing of Discriminatory Legislation and its Arbitrary Application and Selective Enforcement

In imposing a uniform statewide tax on amusement admission charges, the admissions tax law expressly exempted, among other things, "dramatic or musical arts performances." The state law defined this exemption to include "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live *dramatic, choreographic* or *musical performance.*"[5] (Emphasis added.)

When the Legislature enacted this law in 1965, it deleted from the definition of "dramatic or musical arts admission charge" the language contained in a predecessor law of the City

[5] New York Tax Law §1105 (f)(1). This provision is set forth, in relevant part, at p. 3, *supra.*

of New York which had expressly excluded from the exemption "circuses, ice shows [and] aquashows".[6]

On August 25, 1965, 24 days after the effective date of the law which deleted the exclusion of "circuses, ice shows [and] aquashows", and unbeknownst to petitioners until shortly before commencing this action, the State Tax Commission, through its counsel, Edward H. Best, issued a private letter ruling, declaring that ice shows fell within the "dramatic or musical arts performances" exemption to the admission tax imposed by the new law.[7] (A. 49a.)

In 1973 and 1974, at the suggestion of the State Tax Commission and without objection from the State or City, bills were introduced and passed by the New York State Legislature containing a clarifying amendment to §1105(f)(1) of the Tax Law specifically to include circuses within the coverage of the admissions tax exemption.[8] The legislative purpose in enacting the amendments was reflected in the title to the 1974 bill which read: "An Act [t]o amend the tax law, in relation to clarifying and equalizing the exemptions granted and the taxes authorized under existing law for admissions to certain live dramatic, choreographic or musical performances." Both attempts at equalizing the tax treatment were, however, vetoed by New York Governors Rockefeller and Wilson. Each Governor purposefully and intentionally elected to continue to exclude

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[6] §G46-1.0 (3)(a) of the Former Administrative Code of the City of New York, Chap. 46, Title G, entitled "Amusement Tax" (predecessor of the current State and City laws)(enacted by Local Law 1954, No. 37, June 18, 1954, as amended by Local Law 1961, No. 72, October 20, 1961)(repealed by Local Law 1965, No. 72, July 22, 1965 and Laws of 1966, ch. 772, effective August 1, 1965).

[7] On January 2, 1976, after the present action had commenced and petitioners had become aware of the ruling, the State Department of Taxation and Finance issued an opinion revoking it and finding that ice shows did not fall within the admissions tax exemption. Respondents have nonetheless refrained from ever collecting the tax from ice shows. The reversal of position has since been successfully challenged by the Ice Capades. In Metromedia, Inc. v. New York State Tax Commission, (Sup. Ct. Albany Co., Jan. 12, 1979)(Pitt, J.) appeal pending (3d Dep't), the court granted summary judgment declaring the Ice Capades to be exempt from the admissions tax.

[8] N.Y.S. 1336-A, 1973-1974 Sess. (1973); N.Y.S. 9605, 1973-1974 Sess. (1974).

circuses from the exemption noting that substantial revenue losses would result if this "special exemption" were created.[9]

The State Tax Commission admitted in its answer herein that no sales tax had been paid or required to be paid for admission charges to the Walt Disney arena show "Disney on Parade", or to ice shows or other similar shows, on the ground that they were "live dramatic, choreographic or musical performances" and exempt under Tax Law §1105(f)(1). (A. 35a.)

Respondents also imposed no tax on a Spanish circus arts and ethnic dance show entitled "Estrada," performed in 1977.

Respondents also imposed no tax on "The Big Apple Circus," a wholly intrastate circus, which was performed during the summer of 1977 on the property of a State Governmental Authority. The Big Apple Circus, supported by public funds, was a one-ring circus performed in a tent and consisted of clown acts, tumbling, trapeze acts, juggling and dancing accompanied by music played by a small circus band. The performers included paid professionals. (A. 45a.)

4. Relevant New York Proceedings

Petitioners alleged and proved numerous instances of nonenforcement of the tax laws against other circuses and similar shows in support of their claim of "arbitrary," "discriminatory," and "unconstitutional" application of the tax laws. In 1974, petitioners sought discovery from the respondent State Tax Commission of all relevant information regarding (1) respondent Tax Commission's intent behind its selective enforcement of the laws; and (2) the pertinent factors considered by the Commission in determining the application of the exemption to "circuses, ice shows [and] aquashows" and other "dramatic or musical arts performances."

The discovery requested included all ruling letters, memoranda thereon, supporting documents, and other materials dealing with rulings of the Tax Commission that ice shows (such as the Ice Capades) were exempt from the admissions tax. Also sought were all documents relating to the application

[9] Governor's Memorandum of Disapproval of N.Y.S. 1336-A (June 22, 1973); Governor's Memorandum of Disapproval of N.Y.S. 9605 (June 13, 1974).

of the tax to petitioner's Circus, as well as the Walt Disney arena show, carnivals, rodeos, and other dramatic and musical arts performances. Petitioners also requested essentially the same documents under the New York Freedom of Information Act (Article 6 of the Public Officers Law, as amended by 1974 N.Y. Laws, ch. 578).

The Commission responded by producing an excerpted copy of the then already published private letter ruling (A. 49a.) exempting ice shows from the admissions tax, along with several other previously published documents. The Commission, however, refused to produce any of the other documents requested and also failed and refused to schedule a deposition.

Petitioners thereafter moved to compel disclosure and their motion was, in part, denied on the ground that the documents sought were "secret" tax returns, under Tax Law §1146, (*see* p. 13, *infra)* and, in part, granted as to an examination before trial of the Tax Commission. However, the court's opinion and order dated March 23, 1976, scheduling a deposition on March 29, 1976, was not received by the parties until March 31, 1976. Thereafter petitioners twice requested the respondent State Tax Commission to fix an alternate date for examination. The respondent, however, failed and refused to reschedule the deposition.

Following the Commission's failure to comply with this order, petitioners renewed their discovery motion and the respondent Tax Commission thereupon cross-moved for summary judgment asserting that its construction and application of the tax law against petitioner's Circus were proper.

Petitioners then cross-moved for summary judgment but only with respect to the statutory construction issue. With respect to their constitutional claims, petitioners argued that factual issues of discriminatory enforcement had been presented which, in light of the lack of discovery and a hearing on the matter, could not be decided by summary judgment. (A.36a.) The respondent City of New York, thereafter, also moved for summary judgment.

The Supreme Court, New York County, Hon. George Postel, rendered a decision against petitioners on both the

statutory construction issue,[10] *and based on the pleadings alone,* on the constitutional issues.

Petitioners were afforded no discovery or hearing on their constitutional claims and the Court's earlier granting of the Tax Commission's examination before trial was thereby nullified.

Following the court's decision, but before judgment was entered, petitioners learned of the non-enforcement of the tax laws against the state-supported, wholly intrastate, "Big Apple Circus." Petitioners thereupon moved to renew and reargue the prior decision of Justice Postel, arguing again, among other things, that they were entitled to discovery of the direct evidence in the sole possession of respondents on the crucial element of their constitutional claims, and seeking a hearing. Petitioners also sought leave to add to their complaint the allegation of discrimination against interstate commerce based on the facts regarding the "Big Apple Circus." The motion was denied by Hon. Irving Kirschenbaum, who adhered to the prior decision of retired Justice Postel and issued the final order and judgment (A.19a.)

This order and judgment was unanimously affirmed without opinion by the Appellate Division. (A.27a.) The New York Court of Appeals dismissed petitioners' appeal as of right, on the ground "that no substantial constitutional question is directly involved" (A.30a.) That Court also denied petitioners' motion for leave to appeal.

REASONS FOR GRANTING THE WRIT

1. THE STATE AGENCIES AND COURTS FRUSTRATED PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS BY DENYING DISCOVERY AND A HEARING ON ESSENTIAL ELEMENTS OF THEIR CONSTITUTIONAL CLAIMS

A writ of certiorari should be granted because the decisions below, if permitted to stand, prevent a taxpayer who raises constitutional claims under the Equal Protection and Due

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[10] The Court held that Tax Law §1116(d)(2)(B) was dispositive of the issue of statutory construction in "explicitly provid[ing] that circuses [were] not to be included in the admissions tax exemption where any professional performer or operator participates for compensation." (A. 9a.)

Process Clauses from ever reaching trial on the merits in an action brought against State taxing authorities, and will have a similar effect on a broad range of plaintiffs seeking to vindicate their constitutional rights in state courts. The courts below denied petitioners access to the only available evidence on a crucial element of their constitutional claims by refusing to grant discovery and a hearing on the issue, and have then whipsawed them by summarily dismissing those claims for failure to show the very evidence which only the requested discovery and a hearing could have produced.

Respondents have the sole possession of all direct evidence pertaining to their intent and purpose in interpreting and in enforcing the admissions tax laws. Petitioners showed instance after instance of selective enforcement evidencing arbitrary and discriminatory application of these laws. They sought to document the discriminatory intent by obtaining direct evidence through the only means possible—discovery. By holding that petitioners' constitutional claims must be dismissed because they failed to prove what only discovery of that evidence could prove—purposeful intent—the courts have allowed respondents to benefit from their wrongful refusal to produce the evidence.

The determination below that the documents sought were "secret" and thus privileged under Tax Law, §1146 (McKinney's 1967) is baseless. (A.2a.) Section 1146 exempts from disclosure *tax returns* or reports filed in connection with them. No such return or report was ever sought by petitioners in their discovery requests. A simple deletion of a taxpayer's name appearing on a requested document would have sufficed to safeguard whatever arguably privileged information may have even indirectly been involved.[11]

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[11] This was in fact the method employed in connection with the 1965 private letter ruling exempting ice shows. In providing an excerpted copy of the requested letter, the Commission stated: "the name of the ice show and the name of the firm making the inquiry have been deleted." The Court has stated in Henry v. Mississippi, 379 U.S. 443 (1965), that although state procedural rules will be recognized when they serve a legitimate state interest, to the extent that that interest can be satisified without interfering with the vindication of one's constitutional rights, the alternative method should govern. Thus, while the State may have had a legitimate interest in preventing disclosure of truly "secret" information, that interest could have been satisfied by merely excising the names of specific parties disclosed in the requested documents. This approach would be consistent with the disclosure provisions of §§6103 and 6110 of the Internal Revenue

While this Court has consistently required a showing of something more than mere lack of uniformity in the application of a challenged law to constitute a violation of the Equal Protection and Due Process clauses of the Constitution, *Rowley* v. *Chicago N.W. Ry.*, 293 U.S. 102, 111 (1934), *Mackey Telegraph Co.* v. *Little Rock*, 250 U.S. 94, 100 (1919), it has never allowed a state court to preclude such a showing by sanctioning a defendant's stone-walling of all available evidence.

This Court has held that a showing of purposeful and intentional unfairness is necessary for a finding of unconstitutional application of the laws. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Charlestown Ass'n* v. *Alderson*, 324 U.S. 182, 190-91 (1945).[12] This made it incumbent upon the courts below to grant the discovery requests and a hearing on the constitutional issues of respondents' purpose and intent in taxing circuses while exempting other "dramatic, choreographic or musical performances." It is inherently unfair and repugnant to fundamental principles of justice and due process to require the showing of a certain element of proof to preserve a constitutional claim, and then to deny all access to that proof. *Cf., Endicott-Johnson Corp.* v. *Smith*, 266 U.S. 291 (1924); *Turpin* v. *Lemon*, 187 U.S. 51 (1902); *Merchant* v. *Pennsylvania Ry. Co.*, 153 U.S. 380 (1893); *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), *overruled on other grounds, Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

The Court's recent decision in *Herbert* v. *Lando*, 441 U.S. 153 (1979), reflects this well-established principle of American jurisprudence. In *Lando*, the plaintiff, as a "public figure," was required as an essential element of his defamation action, to prove actual malice on the part of the media defendants, *Gertz*

Code. These sections, in ensuring the confidentiality of tax returns and related information, provide for the public disclosure of written determinations and background file documents following the deletion of names, addresses and any other identifying details of the person to whom the document pertains or of any other individual.

[12] This requirement was recently reiterated in City of Mobile v. Bolden, 48 L.W. 4436 (April 22, 1980). Mr. Justice Stewart, writing for a plurality of the Court, noted the "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection clause of the Fourteenth Amendment. See, Washington v. Davis, 426 U.S. 229; Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252; Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 252."

v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964). In seeking to meet this requirement plaintiff sought to depose the defendants at length and sought an order compelling the defendants' response. The defendants had refused to answer on First Amendment freedom of speech grounds.[13]

Rejecting the Second Circuit's holding that the information sought was constitutionally privileged, this Court noted that prohibiting discovery departed from "firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving [an essential element of his cause of action]." 441 U.S. at 169. In reversing the Court of Appeals and compelling discovery, this Court noted that the bar to discovery, had it been upheld, would have "erect[ed] an impenetrable barrier" to the plaintiff's ability to prove the elements of his cause of action.

Similarly, petitioners sought discovery of direct evidence of an essential element of their cause of action—purposeful intent—and a hearing thereon. Here too, an impenetrable barrier has prevented them from proving their case. Under *Lando*, this amounts to an unconstitutional suppression of petitioners' due process rights.

As this Court said in *United States* v. *Nixon*, 418 U.S. 683, 710 (1974), in rejecting another attempt to bar discovery:

> [W]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth.

The refusal below to grant discovery and the summary dismissal of petitioners' constitutional claims without affording a hearing on the merits were significant deviations from accepted principles of due process. The consequential effect on petitioners' ability to preserve other fundamental constitutional rights justifies the grant of the writ of certiorari.

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[13] The respondent State Tax Commission's refusal to comply with the discovery requests differs substantially from the defendant's refusal in Lando. Unlike the publisher in Lando, the Tax Commission has not advanced a claim of constitutional privilege. The balance thus weighs even more heavily in favor of compelling discovery in the case at bar.

If the summary dismissal of petitioners' constitutional claims below, without discovery or a hearing, is permitted to stand, there will be a chilling effect on all who seek to vindicate constitutional rights in state courts. Faced with this clear expression of the state courts' reluctance to entertain constitutional claims, potential litigants will be strongly motivated to pursue their constitutional claims solely in the federal courts.

2. THE ARBITRARY AND DISCRIMINATORY APPLICATION OF THE TAX LAW VIOLATED THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

In the fifteen years since the enactment of §§1105 (f)(1) and 1101(d)(5) of the New York State Tax Law and §§A46-2.0 and A46-1.0 of the Administrative Code of the City of New York, respondents have engaged in systematic, arbitrary and discriminatory application of these statutes in direct contravention of petitioners' equal protection and substantive due process rights under Section 1 of the Fourteenth Amendment and in violation of the Constitution's Commerce Clause, Art. 1, Sec. 8, clause 3. Among various examples of nonenforcement of the admissions tax are ice shows, the Disney arena show "Disney on Parade", a Spanish circus and variety show, and even a one-ring publicly funded circus. Petitioner's Circus, shown to have been at least equal to the others in musical, choreographic and dramatic content, has, however, been denied the benefit of the exemption.

A.

In the face of this extensive pattern of nonenforcement of the tax against performances similar to petitioner's Circus, respondents and the courts below offered no rational basis for the discriminatory application of the laws.

The sole basis offered by the courts below for the exclusion of petitioner's Circus from exemption under the law involved the Legislature's desire to provide economic relief for the "legitimate theater." From this, the court concluded that:

> Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger

> audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense. (A. 16a.)

Far from justifying the unequal treatment, this sole distinguishing basis highlights the discriminatory application. Respondents' unequal application of the laws not only involved similar forms of entertainment performed in arenas generally, but very often in the same arena as the Circus. It is no justification to use location as the basis for different treatment under the statute and then to ignore the fact that those similar non-taxed performances are held in the very same building.

B.

The court below also held, as a matter of law, that petitioners' claims of discriminatory and arbitrary treatment could "at most [amount] to an allegation that the [respondent] Tax Commission mistakenly ruled that some other kinds of arena shows were exempt." (A. 13a). The court concluded that since petitioners "merely alleged that no sales tax had been required by the [respondents] to be paid" on admissions to similar shows "the complaint did not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection." (A. 13a).

Petitioners never alleged mistake or mere failure on the part of respondents to apply the tax to other forms of entertainment.

The complaint was explicit in its allegations that the selective enforcement of the tax law was "arbitrary, unlawful, unconstitutional and discriminatory." (Complaint ¶¶18(d), 19.) In fact, the State's failure to enact corrective legislation because of the potential loss of substantial tax revenues belies the claim that the failure to exempt circuses was neither purposeful nor intentional. The court's dismissal of petitioners' constitutional claims for failure to allege the apparently magical words "willfulness or fraud" is in direct conflict with several of this Court's decisions. (A.13a.)

Addressing the requirements for alleging the unconstitutionality of state statutes, this Court in *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928), said:

> There are various ways in which the validity of a state statute may be drawn in question on the ground of its repugnance to the Constitution of the United States. *No particular form of words or phrases is essential,* but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. (Emphasis supplied.)

Furthermore, this Court held in *Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 298 (1949), that:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Petitioners alleged that the laws at issue are arbitrary and discriminatory, both on their face and as applied. The instances of alleged discriminatory application were alleged with particularity. There can be no question that the claims and the grounds therefor were properly pleaded and brought to the attention of the state courts.[14]

That the courts below would have preferred the selection of different adjectives for claiming unconstitutionality is a wholly insufficient ground on which to dismiss a valid claim of infringement of constitutional rights.

3. IN EXCLUDING CIRCUSES FROM THE EXEMPTION FOR "DRAMATIC OR MUSICAL ARTS PERFORMANCES" THE STATUTE DEPRIVES PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH, DUE PROCESS AND EQUAL PROTECTION

In construing the exemption from the admissions tax afforded "dramatic or musical arts performances" the court below determined that the Legislature had intended to exclude

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[14] This Court is not precluded from granting certiorari even if it is contended that the dismissal was based on a purely state ground, i.e., the form of the pleadings. As noted in Ward v. Love County, 253 U.S. 17 (1920), a state court's use of untenable non-federal grounds as the basis for its decision will not invoke the rule that the Supreme Court will not review the judgment of a state court decided upon an independent non-federal ground.

circuses as a class from eligibility under the exemption.[15] (A. 10a.)

In spite of the uncontroverted evidence presented of the dramatic, musical and choreographic nature of petitioner's "Greatest Show on Earth" and the elimination from the statute of the language which had formerly specifically excluded "circuses, ice shows [and] aquashows" from the exemption, the court below summarily held that the petitioner's Show was excluded from coverage under the exemption because it was *sui generis* — "a beautifully customed [*sic*], well-produced circus." (A. 10a).

Although other forms of entertainment, similar to circuses in content, are to be reviewed on a case by case basis and accorded the exemption when qualified,[16] circuses, as an art form, however dramatic, musical or choreographic they may be, are as a class denied the benefits of the exemption. By so construing the statute, the court below has rendered it unconstitutional.

This irrational exclusion of an entire class of entertainment from the benefits of the exemption amounts to an unconstitutional infringement upon the petitioner Circus's freedom of speech guaranteed by the First Amendment as well as its rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment.

Entertainment is constitutionally protected under the First Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). That the entertainment form will generate a profit or is in any sense a business does not disqualify it from First Amendment protection. *Winters v. New York,* 333 U.S. 507 (1948).

In *Speiser v. Randall,* 357 U.S. 513, 518 (1958), this Court held unconstitutional a California statute denying a tax ex-

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[15] §§1105(f)(1) and 1101(d)(5) of the New York State Tax Law and §§A46-2.0(f)(1) and A46-1.0(d)(5) of the Administrative Code of the City of New York.

[16] Thus, the court in Metromedia, Inc. v. New York State Tax Commission, *supra,* in holding the Ice Capades to be exempt from the admissions tax under §1105(f)(1), noted that the mere fact that a presentation involved ice skating neither precluded nor proved its choreographic and musical nature and that it was accordingly necessary to review each show individually. Circuses, however, have been categorically denied similar case by case analysis.

emption to certain forms of speech, stating: "it cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." It further cautioned that "to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*

The court below offered no compelling state interest justifying the infringement of petitioner Circus's first amendment rights. *See, Roe v. Wade,* 410 U.S. 113 (1973), *Sugarman v. Dougall,* 413 U.S. 634 (1973).

The court's notion that the arena staging of petitioner's Circus affords it greater opportunity to meet its production costs and that thus the Circus is without any need for the economic relief intended by the Legislature, is unsound. It ignores the far lower costs of production of other forms of entertainment often performed in arenas and granted the exemption, such as rock concerts.

The absence of a rational basis for the exclusion of all circuses from coverage under the exemption renders the statute as construed by the New York courts violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment. A state may not place a value judgment upon the worth of a particular form of expression and, absent a compelling interest or rational basis for so doing, burden its exercise. *See, O'Brien v. Skinner,* 414 U.S 524, 530-531 (1974); *United States Dep't of Agriculture v. Moreno,* 413 U.S. 528, 538 (1973).

CONCLUSION

The decisions below prevent taxpayers from vindicating their constitutional rights in the state courts if the evidence they require is in the hands of taxing authorities. The preclusion of all access to direct evidence of an essential element of petitioners' constitutional claims violates fundamental principles of procedural due process. Dismissing constitutional claims on the basis of the wording of the pleadings despite a *prima facie* showing of discriminatory and selective enforcement of state law is similarly objectionable. Furthermore, the absence of a rational basis for excluding all circuses from the admissions tax exemption while according the exemption to similar types of

entertainment violates the First and Fourteenth Amendments to the United States Constitution. For these reasons a writ of certiorari should issue to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

Respectfully submitted,

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May 20, 1980

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 7 read on this motion, SUBMITTED

	Papers Numbered
No. 72 on Calendar of Oct. 29, 1975	
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-7
Answering Affidavit	
Replying Affidavit	
Affidavit	
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion # 73 this date.

Motions numbered 72 and 73 on the calendar of October 29, 1975, are consolidated for disposition and disposed of as follows:

That branch of the motion by plaintiff for an order compelling production of specified documents is denied, and the cross motion for a protective order as regards the aforesaid production is granted.

The documents sought are "secret" and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y. 2d 113).

The part of the motion for an order directing an examination before trial is granted, and the part of the cross motion for an order denying said examination before trial is denied.

The examination shall take place at Special Term, Part II of this court at 10 A.M., on March 29, 1976, or as agreeable to the parties. All rulings necessary with respect to said examination before trial shall be referred to the justice presiding thereat.

Dated March 23, 1976 S/.....
J.S.C.

Briefs: Plaintiff's xx Defendant's x Petitioner's Respondent's Relator's Briefs

County Clerk's No. 10219, 1975
Spec I Liber R73 Line 9, 1975

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 6 read on this motion, SUBMITTED

No. 73 on Calendar of Oct 29, 1975

	Papers Numbered
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-5
Answering Affidavit	
Replying Affidavit	
Affidavit of Service	6
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion #72 this date.

Upon the foregoing papers this motion is disposed of in accordance with decision rendered in companion motion numbered 72 on the calendar of October 29, 1975.

Filed
Mar 23 1976
New York
Co. Clerk's Office

Dated March 23, 1976

S/.....
J.S.C.

County Clerk's No. 10219, 1975
Spec I Liber R-76 Line 1, 1975

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

POSTEL, J.:

Plaintiffs move pursuant to CPLR 2221 for leave to renew the prior order of this court which denied their motion for an order directing the defendant New York State Tax Commission (hereinafter referred to as "Commission") to produce certain documents. The Commission cross-moves for a protective order pursuant to Article 31 of the CPLR, vacating plaintiffs' notice and denying production of the documents referred to therein; and also for an order pursuant to CPLR 3212 dismissing the complaint herein and directing that judgment be entered herein in favor of the Commission on the grounds that the action has no merit as a matter of law.

Plaintiffs cross-move for summary judgment granting a declaratory judgment adjudging that the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of the New York State Tax Law and from the provisions of the Administrative Code of the City of New York, which require the collection of state and city sales taxes on admission charges, and directing that the second cause of action be severed.

This is an action for a declaratory judgment wherein plaintiffs seek an adjudication that the annual performances at the Madison Square Garden Center and elsewhere in New

York State presented by the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (the "Circus") are exempt from the provisions of the New York State Tax Law and the New York City Administrative Code requiring the collection of admissions taxes for certain types of public entertainment as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law §§1105 [f][1], 1101 [d][1]; N.Y.C. Admin. Code §§A46-2.0 [f][1]; A46-1.0 [d][5]).

The circus and its coplaintiff, Ruth E. Lutzic, who purportedly sues on her own behalf as a taxpayer and circus patron and for all others similarly situated as a class, contend that the Circus presents live "dramatic or musical arts performances" within the meaning of the exemption provided in section 1105 (f)(1) of Article 28 of the Tax Law, which also defines a "dramatic or musical arts admission charge" in section 1101 (d)(5) as one charged for "admission to a theatre, opera house, concert hall, or other hall or place of assembly for a live, dramatic, choreographic or musical performance."

Therefore, plaintiffs argue the Circus is exempt from the collection of the state and city taxes on admission charges.

Defendant City of New York says that the admission charges to performances of the plaintiff circus are subject to state and city sales tax and have been subject to such taxes for all periods involved in this action. The city tax provisions in question are identical with the state tax provisions, so that judgment for one defendant would require judgment for the other.

As additional second and third grounds of the first cause of action for declaratory judgment, plaintiffs contend that the statutes in question are arbitrarily, capriciously, and unconstitutionally applied in that other entertainment extravaganzas similar to the circus, such as ice shows and "Disney on Parade," have been granted administrative exemptions from the collection of admission taxes under the above sections of the Tax Law, and that the statutes, if construed as the defendants urge, are unconstitutional on their face. These constitutional grounds based on the Equal Protection and Due Process provisions of both the United States and the New York State Constitutions, as well as on the First Amendment, present, say the plaintiffs,

factual questions which cannot and should not be decided by summary judgment. These secondary contentions therefore preclude defendants' cross-motion for summary judgment and need not be reached if the court grants plaintiffs' motion based on the statute issue.

However, the defendants say that the plaintiffs' argument with respect to discriminatory enforcement of the tax statutes does not preclude the granting of summary judgment to the defendants city and state at this time, as plaintiffs contend, because, as a matter of law, the complaint does not allege the kind of discrimination that constitutes a denial of equal protection. Only a purposeful, invidious, intentionally unfair discrimination in enforcement of a statute may amount to a denial of equal protection. Plaintiffs merely allege that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

Plaintiffs' complaint also contains a second cause of action for a refund to plaintiffs and members of the class of circus patrons of taxes previously paid for admission to the circus. This cause of action is not involved in the present cross-motions. Plaintiffs request that if summary judgment is granted to them on the first cause of action for a declaratory judgment, the two causes of action should be ordered severed pursuant to CPLR 3212 (e) (1). If summary judgment is granted to defendant on the first cause of action, the second cause of action necessarily fails.

Therefore, the primary issue presented by defendant's and plaintiffs' cross-motion is whether the Circus is subject to the state and city sales taxes on admissions.

The city tax involved herein is part of the City Sales Tax Law contained in Title A of Chapter 46 of the New York City Administrative Code. It is imposed pursuant to the authority granted to cities in Article 29 of the State Tax Law (Tax Law, §1210 [a]) to impose the taxes described in Article 28 of the Tax Law. Article 28 is the State Sales Tax Law and contains

the provisions of the state tax also involved in this action. The enabling act for the city tax requires that the city tax be identical with the state tax except in some limited respects not relevant to this action (Tax Law §1210 [a]).

The city tax in question (Admin. Code, §A46-2.0[f][1])* is imposed upon

> "(f) (1) *Any* admission charge where such admission charge is in excess of ten cents to or for the use of *any* place of amusement in the city of New York, *except charges for admission* to racetracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances,* or motion picture theatres, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools." (Emphasis supplied.)

"Place of amusement" is defined as follows (Admin. Code, §A46-1.0[d] [1-0] corresponding to Tax L., §1101[d] [10]):

> "(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided."

Plaintiffs claim that the Circus falls within the statutory exemption provided in Section A46-2.0(f) (1) of the Code and Section 1105(f) (1) of the Tax Law for "dramatic or musical arts performances," which are defined as follows (Admin. Code, §A46-1.0[d] [5] corresponding to Tax L., §1101[d] [5]):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a *live dramatic, choreographic or musical performance.*" (Emphasis supplied.)

Thus, on its face, the exemption applies to admissions to performances of the kind which are commonly regarded as part of the dramatic or musical arts and which are customarily given in theatres, opera houses, concert halls and similar places.

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* This is the same in substance as Tax Law, section 1105(f)(1) except that the latter is statewide.

Obviously, the performance must be predominantly one of the dramatic or musical arts.

The Circus is a unique form of entertainment, customarily performed in a tent or arena.

It has been defined as follows:

> "2a. A circular enclosure surrounded by tiers and seats and usually covered by a large tent, for the exhibition of feats of horsemanship, acrobatic performances, etc. Also, the company of performers with their equipage or the performance itself." Webster's New International Dictionary of the English Language—2d ed., unabridged (G. & C. Merriam Co., 1947), p. 490.

Funk and Wagnalls dictionary defines "circus" as "1. A show in which feats of horsemanship, tumbling, strength, etc., are exhibited." (The Practical Standard Dictionary of the English Language [Funk & Wagnalls Co., 1931], p. 224.)

Everyone is familiar with the traditional circus acts, which are primarily feats of physical skill, strength and daring, interspersed with clowns for comic relief and trained animals.

It seems apparent, therefore, that a circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5).

However, were there room for doubt, it would be dispelled by section A46-7.0(d) (1) of the Administrative Code (corresponding to Tax Law, §1116 [d][1]).

Section A46-7.0(d) (1) exempts from the tax admissions which are otherwise taxable but whose proceeds inure exclusively to the benefit of various religious, charitable, educational, and governmental organizations. It provides the following:

> "(d) (1) Except as provided in paragraph (2) of this subdivision, any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section A46-2.0 . . . ."

The paragraph (2) referred to in the provision above states in pertinent part (Admin. Code, §A46-7.0[d] [2]):

> "The exemption provided under paragraph (1) of this subdivision shall not apply in the case of admissions to:
>
> * * * *
>
> "(B) Carnivals, rodeos, or *circuses* in which any professional performer or operator participates for compensation . . . ." (emphasis supplied)

Accordingly, even in situations where an admission charge would be exempt because it inured to the benefit of an exempt organization, the Legislature has explicitly provided that circuses are not to be included in that exemption where any professional performer or operator participates for compensation.

The legislative history of the exemption for dramatic or musical arts performances supports the conclusion that circuses do not come within the exemption.

The provisions of the state and city sales tax laws involved in this action derive from the former City Admissions Tax imposed by Title G of Chapter 46 of the Administrative Code.

The exemption for dramatic or musical arts performances, like that for motion pictures, was based upon economic hardship.

High costs had drastically cut the number of theatres and the number of productions in the city. The 1960 season had been the most disastrous year on Broadway. It was feared that without relief from the tax on admissions not only would the legitimate theatre industry further decline but that the city's economy would be seriously affected because of the impact of such decline on hotels, restaurants, taxis, garages and other businesses in the city.

Similarly the concert stage, opera and ballet needed relief. Accordingly, the admissions tax was amended by Local Law No. 72 of 1961 to except dramatic or musical arts performances from the tax.

The amendment, in defining "dramatic or musical arts admission charge," expressly excluded circuses, along with ice

shows and aquashows, from the definition (Admin. Code, §G46-1.0(3a), as added by L.L. No. 72 of 1961, §1).

When the state sales tax was enacted (Tax. L., Art. 28, as added by L. 1965, ch. 93), the express exclusion of circuses, ice shows and aquashows in the definition of "dramatic or musical arts admission charge" was dropped as surplusage (Tax Law, §1101 [d] [5]). As the city tax imposed by Title A of Chapter 46 of the Administrative Code was required to be substantially identical with the state tax, the express exclusion of circuses, ice shows, and aquashows was dropped from the corresponding definition in the city tax.

Further, a viewing of the circus shows that it is not a "drama,"** that the music is background music, subsidiary to the circus acts, and that the choreographic elements are incidental, being performed by persons seemingly chosen for their athletic ability in climbing ropes and riding elephants rather than training in the dance.

In short, the performance is that of a beautifully customed, well-produced circus.

The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic or musical arts performances. But, should there be any doubt, this doubt must be resolved in favor of defendants.

The rule is well established that a tax exemption is never presumed or inferred; the taxpayer must bring himself clearly within its ambit, for a tax exemption will not be granted unless its terms plainly and unequivocally apply and will not be recognized in case of any doubt. Matter of Young v. Bragalini, 3 N.Y.2d 602, 605, 606 (1958); Matter of Schwartzman, 262 App. Div. 635, 636 (3d Dept. 1941) affd. 288 N.Y. 568 (1942); People v. Brooklyn Garden Apartments, 283 N.Y. 373, 380 (1940); City of Rochester v. U.F.S. Dist. No. 4 of Livonia,

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** "Drama" is defined as "1. A composition, now usually in prose, arranged for enactment, and intended to portray life or character or to tell a story by actions and, usually, dialogue tending toward some result based upon them; a play. It is designed or composed as though designed, to be performed by actors on the stage." Webster's New International Dictionary of the English Language, 2d ed., unabridged (G. & C. Merriam Co., 1947), p. 782.

255 App. Div. 96, 102 (4th Dept. 1938); Matter of Bd. of Education, Jamestown v. Baker, 241 App. Div. 574, 575-576 (4th Dept. 1934), affd. 266 N.Y. 636 (1935); People ex rel. 300 Park Avenue, Inc. v. Goldfogle, 225 App. Div. 356, 359 (1st Dept. 1929).

In light of the multitude of tax cases dealing with similar arguments, plaintiffs' constitutional arguments are without merit.

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles.

The rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm. 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Demand & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas, 217 U.S. 114, 126 (1910).

One of the clearest statements of just how far the Legislature may go in classifying for tax purposes is to be found in People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906), affirmed 204 U.S. 152 (1907). The court stated the general proposition as follows (p. 443):

> "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it

> is unreasonable, but that does not make it unconstitutional, even if the result is double taxation."

It went on to point out that (p. 445):

> "The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. . . ."

Thus, in Cook v. Marshall County, 196 U.S. 261, 274-275 (1905), a distinction between wholesale dealers and retail dealers for tax purposes was upheld. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910), a license tax which taxed rectifiers and blenders of distilled spirits was upheld, although the tax did not apply to distillers who did not rectify or blend their liquor. The case of Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), sustained a tax on wholesale dealers in certain specified articles although it did not tax wholesale dealers in other articles.

In Singer Sewing Machine Co. v. Brickell, 233 U.S. 304 (1914), a tax was found valid although it was imposed on the business of selling sewing machines by traveling salesmen and was not imposed on the selling of such machines at an established place of business. It is proper to tax anthracite coal and not tax bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). The mining of iron ore where carried on by the owner may be taxed, while exempting such business if carried on by contractors. Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Different tax treatment may be accorded to different classes of private bankers. Bradley v. Richmond, 227 U.S. 477 (1913). Tenants occupying real property may be taxed even though owner-occupants are not. Ampco Print.-Advs. Corp. v. City of N.Y., 14 N.Y.2d 11 (1964), appeal dismissed for want of a substantial federal question, 379 U.S. 5 (1964).

Plaintiffs' claim of discriminatory enforcement is also not warranted.

The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. Snowden v. Hughes, 321 U.S. 1, 8 (1944), rehr. den. 321 U.S. 804 (1944); Di Maggio v. Brown, 19 N.Y.2d 283, 289-291 (1967); People v. Friedman, 302 N.Y. 75 (1950), app. dsmd. for want of subst. fed. question, 341 U.S. 907 (1951).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. Charlestown Assn. v. Alderson, 324 U.S. 182, 190-191 (1945), rehr. den. 324 U.S. 888 (1945); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. Mackay Telegraph Co. v. Little Rock, 250 U.S. 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the principle of uniformity. Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 111 (1934), rehr. den. 293 U.S. 632 (1934). The burden of proof is on the taxpayer. (Charlestown Assn. v. Alderson, supra, 324 U.S. 182, 191 [1945]).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.

It merely alleges that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Indeed, the plaintiffs' argument that state and city officials had no objection to a change in the law to exempt circuses is

inconsistent with a claim of intentional or fraudulent discrimination.

Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. Shapiro v. City of New York, 32 N Y 2d 96, 102 (1973), app. dsmd. for want of a substantial fed. question, 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of New York, 14 N.Y.2d 11, 24 (1964), app. dsmd. for want of a substantial fed. question, 379 U.S. 5 (1964).

Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed.

Suffice it to say, the First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S. C. 438, 7 S. E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex. 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959 (1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dsmd. for want of a substantial fed. question 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dsmd. for want of a substantial fed. question 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerpsa, 4 N.Y. 2d 302 (1958), app. dsmd. for want of a substantial fed. question 358 U.S. 39 (1958).

The case of Grosjean v. American Press Co., 297 U.S. 233 (1936), illustrates the kind of tax which is constitutionally objectionable under the First Amendment. In the Grosjean case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information. It spelled this out as follows (pp. 250-251):

> "But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> . . . The tax here involved is bad not because it takes money from the pockets of appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . ."

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes were economic, as were the Governors' vetoes of bills to exempt circuses.

Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

Accordingly, the defendant's motion for summary judgment is granted to the extent of dismissing the second cause of action. The first cause of action, which seeks a declaratory judgment is not subject to dismissal merely because plaintiffs are not entitled to the declaration which they seek (Lanza v. Wagner, 11 N.Y.2d 317, at 334; James H. Meritt Plumbing, Inc. v. City of New York, 55 A D 2d 552). Therefore, that branch of defendants' cross-motion which seeks dismissal of the first cause of action is denied.

Plaintiffs' cross-motion for summary judgment is disposed of to the extent of adjudging that the plaintiff Circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charges to the circus, and is otherwise denied. In view of the foregoing, plaintiffs' motion for leave to renew and that branch of the defendant's cross-motion which seeks a protective order, are denied as academic.

Settle judgment.

Dated: August 10, 1977

J. S. C.

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

RINGLING BROS.—BARNUM & BAILEY, COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

KIRSCHENBAUM, J.

Motions under calendar numbers 35 and 36 of March 6, 1978 are consolidated for disposition.

Plaintiffs move for leave to renew and reargue the decision of Mr. Justice Postel dated August 10, 1977. Defendants move for entry of an order, pursuant to CPLR § 9002, upon the decision of Mr. Justice Postel.

In this action for a declaratory judgment, Mr. Justice Postel, now retired, rendered a lengthy decision declaring that plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. (the "Circus") was liable for collection and payment of New York State and City sales taxes on admission charges to the Circus. Insofar as plaintiffs seek reargument, the motion is denied for want of a sufficient showing that the court overlooked or misconstrued any material principles of law or fact.

That branch of plaintiffs' motion which seeks renewal of their argument concerning denial of equal protection and discriminatory enforcement is based upon allegedly "newly discovered events." Specifically, plaintiffs allege that tickets to a Spanish dance and circus arts show entitled "Estrada" which was performed in September 1977, and to the "Big Apple Circus," which was performed during the summer of 1977, and to various ice shows, were not subject to the taxes complained

of. In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she nor the State Tax Commission was aware of the existence of the "Big Apple Circus," a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is more nonenforcement of the statute against others similarly situated, which is not enough (see *Matter of DiMaggio* v. *Brown,* 19 N.Y.2d 283, 290-91; *Matter of G&B Publishing Co., Inc.* v. *Department of Taxation and Finance, Sales Tax Bureau,* 57 A.D. 2d 18, 21, app. den., 42 N.Y.2d 807).

Plaintiffs have submitted additional factual affidavits in support of renewal. Accordingly, leave to renew is granted. However, even considering the additional factual affidavits, the court is unconvinced that Mr. Justice Postel overlooked or misconstrued any material principles of law or fact. Accordingly, on renewal, the court adheres to the decision of Mr. Justice Postel.

Plaintiffs' other arguments are equally without merit. The request by plaintiffs in their reply papers for leave to replead is denied. They have failed to satisfy the court that they have good ground to support their proposed cause of action for alleged discriminatory enforcement against interstate commerce, (see CPLR § 3211 subd. e; *Ati, Inc.* v. *Ruder & Finn, Inc.,* 42 N.Y.2d 454, 461).

In view of this court's granting of renewal, defendants' motion, pursuant to CPLR § 9002, is denied.

Settle order.

Dated: April 18, 1978

.....

J.S.C.

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Courthouse in the City and County of New York on the 23 day of May, 1978.

PRESENT: HON. IRVING KIRSCHENBAUM, Justice

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK, *Defendants.*	**Index No. 10219/75** **ORDER AND JUDGMENT**

This action having been brought by the plaintiffs against the defendants, demanding in the first cause of action of the complaint herein a declaratory judgment adjudging and declaring that charges for admission to the performances of the circus presented at the Madison Square Garden Center and elsewhere in New York State by the plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. are exempt from the taxes on admission charges imposed by Article 28 of the New York State Tax Law and by Title A of Chapter 46 of the New York City Administrative Code, as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law, secs. 1105[f][1], 1101[d][5]; N.Y.C. Admin. Code, secs. A46-2.0[f][1]; A46-1.0[d][5]), and for other related relief, and demanding in the second cause of action of the complaint a refund, to plaintiff Lutzic and members of the class of circus patrons, of taxes previously paid on admission charges to the said performances of the circus;

And the defendants, New York State Tax Commission and The City of New York, having timely appeared and served

answers and counterclaims and having requested declaratory and other relief in their favor and the plaintiffs having timely served replies to said counterclaims, and the plaintiffs having moved at Special Term, Part I, of this Court for an order compelling the defendant New York State Tax Commission to appear for an examination before trial and to produce certain documents, and the defendant New York State Tax Commission having moved at Special Term, Part I, for a protective order, and this Court by Hon. George Postel, J.S.C., sitting in Special Term, Part I, having heard and determined these motions by separate decisions and orders, dated March 23, 1975, denying that part of plaintiffs' motion that was for an order compelling production of specified documents and that part of said defendant's cross-motion that was for an order denying said examination before trial, and granting that part of plaintiffs' motion that was for directing an examination before trial and that part of said defendant's cross-motion that was for a protective order with respect to said documents;

And the plaintiffs having moved for leave to renew their motion for the production of certain documents, and the defendant New York State Tax Commission having cross-moved for a protective order and for an order granting summary judgment dismissing the complaint and directing that judgment be entered in its favor, and the plaintiffs having cross-moved for summary judgment in their favor and against the defendants New York State Tax Commission and City of New York, and the defendant City of New York having requested that summary judgment be granted in favor of the defendants City of New York and New York State Tax Commission;

Now, upon reading and filing the summons, dated February 4, 1972; the complaint, verified February 4, 1972; the answer of the defendant New York State Tax Commission, verified June 29, 1972; the answer of the defendant City of New York, verified May 25, 1972; the reply to the counterclaim of defendant New York State Tax Commission, verified July 11, 1972; the reply to the counterclaim of defendant City of New York, verified July 11, 1972; and

Upon plaintiffs' notice of motion, dated January 3, 1977, for leave to renew their motion for an order compelling

defendant New York State Tax Commission to produce certain documents and the supporting affidavit of Lawrence W. Boes, sworn to January 3, 1977, with Exhibits A and B attached thereto, submitted in support of plaintiffs' motion, and

Upon the notice of motion by defendant New York State Tax Commission, dated January 20, 1977, for a protective order and for an order granting summary judgment, dismissing the complaint and directing that judgment be entered in favor of the defendant State Tax Commission, and the supporting affidavit of Robert W. Bush, sworn to January 20, 1977, with Exhibits A through H attached thereto, submitted in support of said defendant's cross-motion and in opposition to plaintiffs' motion, and

Upon the notice of plaintiffs' cross-motion, dated March 23 1977, for summary judgment in favor of the plaintiffs, granting a judgment declaring and adjudging that the plaintiff Ringling Bros.-Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of Section 1105[f][1] of the New York Tax Law and from the provisions of Section A46-2.0[f][1] of the Administrative Code of the City of New York, imposing sales taxes on admission charges, and the supporting affidavits of Robert Thrun sworn to March 23, 1977, of Kenneth Feld, sworn to March 21, 1977, of Bill Bradley, sworn to March 17, 1977, and of William Pruyn, sworn to March 23, 1977, with Exhibits A through K attached thereto, and the letter of Lawrence W. Boes, dated March 25, 1977, addressed to Hon. George Postel, J.S.C., requesting oral argument and suggesting a viewing of the said plaintiff's circus by the Court and by counsel for all parties, submitted in support of plaintiffs' cross-motion and in opposition to said defendant's cross-motion, and

Upon the affidavit of Gale Zareko, sworn to March 25, 1977, submitted on behalf of defendant City of New York, requesting an adjournment of the hearing of the aforesaid motions and, alternatively, that summary judgment be granted in favor of the defendant City of New York by a judgment declaring that admission charges to circuses, and more particularly to circuses presented by plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc., are subject to State and City sales taxes, and

Upon the supplemental affidavit of Lawrence W. Boes, sworn to April 28, 1977, with accompanying Exhibit L, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to the defendants' cross-motions for summary judgment, and the letter of Lawrence W. Boes, dated April 28, 1977, addressed to Hon. George Postel, J.S.C., arranging for viewing of plaintiffs' circus by the Court and counsel for all parties, counsel for all parties having consented thereto, and

Upon the viewing of a performance of said plaintiffs' circus by the Court and counsel for all parties on May 3, 1977, with the exception of counsel for the State Tax Commission, and

Upon the supplemental affidavit of Gale Zareko, sworn to May 12, 1977, with Exhibits A and B attached thereto, submitted in support of said defendants' cross-motions for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment, and

Upon the reply affidavit of Lawrence W. Boes, sworn to June 1, 1977, with Exhibits M and N attached thereto, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to said defendants' cross-motions for summary judgment, and

Upon the letter of Louis J. Lefkowitz, Attorney General of the State of New York, by Robert W. Bush, Assistant Attorney General, dated June 13, 1977, and the Application for Authority under Section 1304 of the Business Corporation Law, dated August 23, 1971, the Consent by the State Tax Commission dated September 29, 1971, and the Certificate dated September 15, 1971, submitted in support of defendants' cross-motions for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment, and

Upon the affidavit of William Webb, II, sworn to June 17, 1977, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to defendants' cross-motion for summary judgment,

And the parties having submitted memoranda of law in support of their respective motions for summary judgment and their respective counsel having been heard on said motions, and

the Hon. George Postel, J.S.C., after due deliberation having duly made and filed a decision in writing on the 10th day of August, 1977,

And the plaintiffs having moved for leave to renew and reargue the prior decision of the Hon. George Postel, J.S.C., made on the 10th day of August, 1977, insofar as said decision (a) held and granted a declaratory judgment that the circus performances of plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. are subject to the New York State Tax Law and the corresponding provisions of the New York City Administrative Code which impose state and city sales taxes on charges for admission to certain places of amusement; (b) dismissed the second cause of action brought by plaintiff Lutzic on behalf of herself and all other taxpayers similarly situated for a refund of taxes improperly collected; and (c) denied "as academic" plaintiffs' motion to renew its prior motion to compel production of certain relevant documents;

And the defendant State Tax Commission having moved that an order, pursuant to CPLR 9002, be signed and entered upon the said decision of Mr. Justice Postel, and

Upon plaintiffs' notice of motion, dated February 3, 1978 for leave to renew and reargue the prior decision of the Hon. George Postel, J.S.C. (who had retired as a Justice of this Court on the 21st day of December, 1977) made on the 10th day of August, 1977, and the supporting affidavit of Lawrence W. Boes, sworn to the 3rd day of February, 1978, with Exhibits A through I annexed thereto, and the supporting affidavit of Leonard Duane Easter, sworn to the 29th day of September, 1977, and Exhibit A annexed thereto, and the supporting affidavit of Michael D. Oden, sworn to the 3rd day of February, 1978, and the supporting affidavit of William Webb, II, sworn to the 30th day of August, 1977, and

Upon the affidavit of Gale Zareko, sworn to the 17th day of February, 1978, submitted on behalf of the defendant City of New York, and the affidavit of Robert W. Bush, sworn to the 22nd day of February, 1978, with an exhibit annexed thereto, submitted on behalf of the defendant State Tax Commission, in opposition to plaintiffs' motion for renewal and reargument, and

Upon the reply affidavit of Lawrence W. Boes, sworn to the 27th day of February, 1978, with Exhibits A and B annexed thereto, submitted in support of plaintiffs' motion for renewal and reargument and requesting leave to replead by adding the allegation that defendants have discriminated against interstate commerce in violation of Article I, Section 8, clause 3 of the U.S. Constitution, and

Upon the supplemental exhibit of Gale Zareko, sworn to the 3rd day of March, 1978, with exhibit "A" annexed thereto, submitted on behalf of the defendant City of New York in opposition to plaintiffs' motion for renewal and reargument and to plaintiffs' request for leave to replead, and

Upon the notice of motion of defendant State Tax Commission dated February 9, 1978, that an order be signed and entered upon the said decision of Mr. Justice Postel, pursuant to CPLR 9002, and the affidavit of Robert W. Bush, sworn to the 10th day of February, 1978, with a proposed order and judgment annexed thereto, and

Upon the affidavit of Lawrence W. Boes, sworn to the 21st day of February 1978, with Exhibits A and B annexed thereto, submitted by plaintiffs in response to said motion of the defendant State Tax Commission,

And the parties having argued said motions on the 6th day of March, 1978, and the plaintiffs having submitted in support of their motion for reargument and renewal, and the Hon. Irving Kirschenbaum, J.S.C. after due deliberation having duly made a decision in writing on the 18th day of April, 1978, granting in part and denying in part the plaintiffs' motion for renewal and reargument, and adhering to said decision of Mr. Justice Postel, and denying the motion of defendant State Tax Commission that an order be signed and entered on the decision of Mr. Justice Postel,

Now, on motion of Reavis & McGrath, Esqs., attorneys for the plaintiffs, and upon the affidavit of Lawrence W. Boes, sworn to the 12th day of May, 1978, and the exhibit annexed thereto, it is

Ordered that motions under calendar numbers 35 and 36 on March 6, 1978 are consolidated for disposition; and it is further

(1) ORDERED, ADJUDGED AND DECREED that the plaintiffs and defendants herein are entitled to a declaratory judgment in this action as to the first cause of action of the complaint herein, pursuant to CPLR 3001, declaring the rights and other legal relationships of the parties hereto; and it is further

(2) ORDERED, ADJUDGED AND DECREED that this Court does hereby declare that the rights of the plaintiffs and the defendants, with respect to the subject matter of the first cause of action of the plaintiffs' complaint, are as follows:

(A) Admission charges to performances of the circus presented by the plaintiff, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., at the Madison Square Garden Center in New York City and elsewhere in the State of New York and to performances of other circuses in the State of New York are subject to the provisions of Article 28 of the New York State Tax Law imposing sales taxes on admission charges and requiring the billing and collection of such taxes on such charges, and admission charges to such performances in the City of New York are also subject to the provisions of Title A of Chapter 46 of the Administrative Code of the City of New York imposing a sales tax on admission charges and requiring the billing and collection of such tax on such charges, for all periods when such provisions were and are in effect; and

(B) The performances of the circus presented by the plaintiff, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and performances of other circuses do not qualify under the exemption from said sales tax laws for "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" within the meaning of New York State Tax Law, secs. 1105[f][1] and 1101[d][5] and New York City Administrative Code, secs. A46-2.0 [f][1] and A46-1.0[d][5]; and

(C) The aforesaid State and City tax laws, both on their face and as applied by the defendants, do not violate or infringe the plaintiffs' constitutional rights under the Equal Protection Clauses of Article I, Section 11, of the Constitution of the State of New York or of the Fourteenth Amendment, Section 1, to the Constitution of the United States, the Due Process Clauses of said Constitutions, or the First Amendment to the Constitution of the United States, and it is further

(3) ORDERED that plaintiffs' motion for leave to renew and reargue that branch of the cross-motion of defendant New York State Tax Commission which seeks a protective order are denied as academic; and it is further

(4) ORDERED that that part of defendant New York State Tax Commission's cross-motion for summary judgment which seeks dismissal of the first cause of action of plaintiffs' complaint is denied; and it is further

(5) ORDERED that that part of defendants' cross-motions for summary judgment is granted to the extent of dismissing the second cause of action of plaintiffs' complaint; and it is further

(6) ORDERED, ADJUDGED AND DECREED that the second cause of action of plaintiffs' complaint shall be and hereby is dismissed; and it is further

(7) ORDERED that that part of plaintiffs' motion seeking leave to reargue the prior decision of Mr. Justice Postel, dated the 10th day of August, 1977, shall be and hereby is denied; and it is further

(8) ORDERED that that part of plaintiffs' motion seeking leave to renew said decision is granted; and it is further

(9) ORDERED that, on the renewal, the decision of Mr. Justice Postel, dated the 10th day of August, 1977, is adhered to; and it is further

(10) ORDERED that plaintiffs' request for leave to replead is denied; and it is further

(11) ORDERED that the motion of defendant State Tax Commission, pursuant to CPLR 9002, that an order be signed and entered upon the decision of Mr. Justice Postel dated August 10, 1977, shall be and hereby is denied.

ENTER

[SEAL] S/Justice of the Supreme Court

NORMAN GOODMAN, Clerk
Filed—June 9, 1978
New York County Clerk's Office

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 20, 1979

Present—Hon. Myles J. Lane, Justice Presiding
Arthur Markewich,
Vincent A. Lupiano,
Samuel J. Silverman,
David Ross, Justices.

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants-Respondents.

6622

An appeal having been taken to this Court by the plaintiffs-appellants from so much of the order and judgment (one paper) of the Supreme Court, New York County (Kirschenbaum, J.), entered on June 9, 1978, as determined that the circus performances are subject to State and City sales taxes, as set forth in appellants' notice of appeal, and said appeal having been argued by Mr. Sheldon V. Ekman of counsel for the appellants, by Mr. Francis V. Dow of counsel for respondent New York State Tax Commission, and by Gale Zareko of counsel for respondent The City of New York; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk
Docketed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.-BARNUM & BAILEY COMBIINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK, *Defendants.*	NOTICE OF APPEAL Index No. 10219-1975

SIRS:

PLEASE TAKE NOTICE that the plaintiffs, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Ruth E. Lutzic, relying upon questions directly involving the construction of the due process and equal protection clauses of the Constitution of the State of New York (Article I, Section 6 and Section 11), and the due process and equal protection clauses of the Constitution of the United States (Fourteenth Amendment, Section 1), the interstate commerce clause of the Constitution of the United States (Article I, Section 8, clause 3), and the First Amendment to the Constitution of the United States, hereby appeal as of right to the Court of Appeals of the State of New York from the order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on November 20, 1979, which unanimously affirmed the order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on June 9, 1978, and plaintiffs appeal from each and every part of the order of the Appellate Division, as well as from the whole thereof.

Dated: New York, New York
December 26, 1979

Yours, etc.,

REAVIS & MCGRATH
Attorneys for Plaintiffs
345 Park Avenue
New York, New York 10022
(212) 752-6830

To:

Clerk of the County of New York
Hon. Robert Abrams
Attorney General of the State of New York

Attorney for Defendant
The New York State Tax Commission
Attention: Francis V. Dow, Esq.
The Capitol
Albany, New York 12224
(516) 474-7764

Hon. Allen G. Schwartz
Corporation Counsel of the City of New York
Attorney for Defendant The City of New York
Attention: Gale Zareko, Esq.
100 Church Street
New York, New York 10007
(212) 566-3328

Order of New York Court of Appeals, dated February 20, 1980, dismissing petitioners' appeal as of right and denying motion for permission to appeal.

1 Mo. No. 76
Ringling Bros.-Barnum & Bailey Combined Shows, Inc., et al.,

Appellants,

vs.

New York State Tax Commission and the City of New York,

Respondents.

(A) Motion to dismiss the appeal taken as of right granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

(B) Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
COMPLAINT NO.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Plaintiffs, complaining of defendants, by Reavis & McGrath, its attorneys, allege:

AS AND FOR A FIRST CAUSE OF ACTION FOR A DECLARATORY JUDGMENT AND INJUNCTION:

1. (a) At all times hereinafter mentioned, the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. ("Ringling Bros.") was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and is duly authorized and qualified to do business in the State of New York, pursuant to Article 13 of the Business Corporation Law of the State of New York, with an office within the City, County and State of New York.

(b) At all times hereinafter mentioned, the plaintiff Ruth E. Lutzic was and is a natural person residing in the County of Nassau, State of New York, who purchased tickets for and attended a performance of the Ringling Bros. Circus in 1971 with her family.

2. (a) The defendant New York State Tax Commission was and still is a duly authorized and existing agency of the

State of New York under and by virtue of Article 8 of the Tax Law of the State of New York.

(b) The defendant City of New York was and still is a municipal corporation duly organized and existing under and by virtue of state law and the New York City Charter.

3. Plaintiff, Ringling Bros., presents performances of the Ringling Bros. Circus in major cities throughout the United States and Canada, exclusively in indoor arenas or auditoriums. For over seventy (70) years, the Ringling Bros. Circus and its predecessors have been advertised and known to the general public as "The Greatest Show on Earth". The Ringling Bros. Circus includes traditional live circus acts such as clown acts, high wire and trapeze acts, aerial ballets, animal acts, teeterboard and perch acts and various other acts, such as jugglers, unicycles, tumblers, horsemen, etc., which traditional acts include various dramatic, choreographic and musical elements. In addition to these traditional circus acts, each performance of the Ringling Bros. Circus includes five production number extravaganzas which combine musical selections with a choreographic procession of circus performers in various costumes built around a central dramatic theme. Appropriate music for the production numbers, as well as music accompanying the acts, is provided by the Ringling Bros. Circus band. All of the performances of the Ringling Bros. Circus include live dramatic, choreographic and musical elements in combination and conjunction with traditional circus acts.

* * * *

15. Upon information and belief, no sales tax has been paid or has been required by defendants to be paid under Section 1105(f)(1) of the Tax Law upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances.

* * * *

18. Plaintiffs contend:

(a) that the application and enforcement of state and city tax laws with respect to the admission charges for the

Ringling Bros. Circus violate the provisions of Sections 1105(f)(1) and 1101(d)(5) of the Tax Law in that the Ringling Bros. Circus is "a live dramatic, choreographic or musical performance";

(b) that the exception for "carnivals, rodeos or circuses" in Section 1116(d)(2)(B) of the Tax Law has reference only to the exemption granted in Section 1116(d)(1) of the Tax Law for certain nonprofit organizations and does not amend the exemption otherwise stated in Sections 1105(f)(1) and 1101(d)(5) for "a live dramatic, choreographic or musical performance."

(c) in the alternative, that if the Tax Law requires the Ringling Bros. Circus to collect state and city sales tax on admission charges from its patrons, while exempting therefrom admission charges for other live dramatic, choreographic and musical performances, the Tax Law on its face deprives plaintiffs Ruth E. Lutzic and Ringling Bros. and its millions of patrons of the equal protection of the laws in violation of Article I, Section 11, of the Constitution of the State of New York and Amendment XIV, Section 1, to the Constitution of the United States; and

(d) that the defendant State Tax Commission's arbitrary and discriminatory application of the Tax Law deprives plaintiffs Ruth E. Lutzic and Ringling Bros. and its millions of patrons of the equal protection of the laws in violation of Article I, Section 11, of the Constitution of the State of New York and Amendment XIV, Section 1, to the Constitution of the United States.

19. Because of the unlawful, unconstitutional and discriminatory application of the state and city sales taxes to the Ringling Bros. Circus and the exemption from those same taxes for shows of a similar nature and character, the plaintiff Ringling Bros. has been deprived of substantial revenues in the State of New York and its competitors have been given a substantial monetary advantage, in terms of meeting costs and obtaining profits, over the plaintiff Ringling Bros.

* * *

Wherefore, plaintiffs respectfully demand judgment:

(a) adjudging and declaring that Section 1105(f)(1) of the Tax Law of the State of New York, pertaining to the imposition of a sales tax on admission charges, cannot lawfully be applied to admission charges for the Ringling Bros. Circus;

(b) in the alternative, adjudging and declaring that Section 1105(f)(1) of the Tax Law of the State of New York, on its face and as applied, is void and unconstitutional, insofar as it imposes a sales tax on admission charges to the Ringling Bros. Circus, while exempting therefrom all other dramatic and musical arts productions;

(c) Enjoining and restraining defendants, and each and every one of them and their officers, employees and agents, both during the pendency of this action and permanently from enforcing and implementing the aforesaid State and City sales taxes to the admission charges for the Ringling Bros. Circus; and

(d) Awarding damages against defendants and in favor of plaintiff Ruth E. Lutzic and the class of persons who paid sales taxes in the State of New York on admission charges to the Ringling Bros. Circus for all sums that defendants collected from the sales taxes wrongfully imposed on performances of the Ringling Bros. Circus; and

(e) Such other and further relief as to the Court may seem just and proper.

REAVIS & MCGRATH
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005

STATE OF NEW YORK
SUPREME COURT
COUNTY OF NEW YORK

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK *Defendants.*	**ANSWER** **Index No.**

Defendant New York State Tax Commission, by Louis J. Lefkowitz, Attorney General of the State of New York, counsel for such defendant, in answer to the complaint herein, respectfully alleges:

. . . .

FIFTH: That with respect to the allegations contained in paragraph numbered "15" thereof, denies that the other shows referred to therein "are similar in nature and character to the Ringling Bros. Circus" as therein alleged.

. . . .

Dated: June 28, 1972.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant State Tax Commission
Office and P.O. Address
The Capitol
Albany, New York 12224

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10210-75
AFFIDAVIT OF ROBERT THRUN

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ROBERT THRUN, being duly sworn, deposes and says:

1. I am a member of the firm of Reavis & McGrath, attorneys for the plaintiffs herein, and submit this affidavit in support of plaintiffs' cross-motion for summary judgment. I am personally familiar with the facts hereinafter set forth.

* * * *

THE PRIOR MOTIONS

4. On or about June 25, 1975, after all other reasonable efforts had failed, plaintiffs moved this Court for an order, pursuant to Article 31 of the CPLR, compelling the defendant New York State Tax Commission (hereinafter "the Commission") to appear at an examination before trial and to produce specified documents, which are more fully set forth in said notice of motion. The purpose of this attempted discovery of the Commission's records was primarily directed in support of plaintiffs' charge of capricious, arbitrary and unconstitutional application of the tax statutes, as stated in paragraph 2(b) above, and in aid of the contention that the tax statutes are

unconstitutional on their face, as indicated in paragraph 2(c) above.

5. In a decision, dated March 23, 1976 (a copy of which is annexed as Exhibit B to the moving affidavit of Lawrence W. Boes, sworn to January 3, 1977) the Court denied the plaintiffs' motion for an order directing the Commission to produce certain documents, and granted the Commission a protective order with regard to those specific documents. The Court also ordered the Tax Commission to appear for an examination before trial on March 29, 1976, "or as agreeable to the parties" but since the parties did not receive copies of the order until March 31, 1976, an examination could not be held on March 29, 1976. Thereafter, we twice requested the Commission to fix a date for examination by letters dated March 31, 1976 and April 8, 1976, but the Tax Commission has failed and refused to honor our requests. (Exs. F-G.)

6. In particular the plaintiffs sought production of the following documents:

(a) All applications for rulings together with all papers, memoranda, supporting documents and other materials contained in the files of the Commission, or under the Commission's custody or control, with respect to rulings by the Commission that ice shows (such as Holiday on Ice, Ice Capades and similar presentations) were not subject to the New York State sales tax on admission charges; and

(b) All papers, memoranda, submissions and other documentary evidence supplied to the Commission with respect to the application of Island Garden, Inc. and of Arnold Carlson for review of a denial of refund of sales and use tax for the period June 1, 1966 through May 31, 1970 which resulted in an administrative decision of the Commission based on these underlying materials in lieu of a public hearing; and

(c) All papers, memoranda, records and other documents contained in the files of the Commission, or in the Commission's custody or control, which were supplied to the Commission in connection with any determinations

made by the Commission relating to the applicability of the New York sales tax to circuses or circus performances.

* * * *

8. Defendant Commission again seeks a protective order denying the production of certain documents, although such motion is unnecessary, this Court having already granted such an order in its memorandum of March 23, 1976. (Ex. B annexed to Boes affidavit of January 3, 1977.) Furthermore, defendant seeks an order dismissing the complaint herein and directing that summary judgment be granted in favor of the defendant Commission. In light of the three separate and distinct grounds for legal relief urged in the first cause of action of plaintiffs' complaint and the fact that the Tax Commission's cross-motion speaks only to the first issue of statutory construction of the Tax Law, summary judgment dismissing the complaint in its entirety cannot be granted in the defendant Commission's favor. Nevertheless, since the issue of statutory construction has been squarely posed in the defendant's motion and in plaintiffs' cross-motion, and this issue is solely a question of law and both sides agree there are no triable issues of fact as to this issue, summary judgment should be granted in plaintiffs' favor, if the Court so determines, thus mooting the constitutional issues and all necessity for any factual discovery and evidentiary trial to determine this action.

* * * *

NECESSITY FOR FURTHER DISCOVERY ON CONSTITUTIONAL ISSUES

21. If, for any reason summary judgment cannot be granted to plaintiffs on the first statutory construction issue, it is clear that summary judgment may not be granted to the defendant Commission. Contrary to the defendant Commission's moving papers, this action does not solely concern an issue of statutory construction based wholly on the law. The discovery requested by plaintiffs by means of the pending motion for renewal clearly involves an issue of fact whether the statutes in question are capriciously, arbitrarily and unconstitutionally applied by the defendants, as well as whether the statutes mandate the Commission to make arbitrary and dis-

criminatory distinctions in violation of the Equal Protection clauses of the state and federal constitutions and the First Amendment as incorporated therein. Thus, even if the statute were read to include the Circus in the taxable category, the State Tax Commission has not given any discovery on the constitutional issues presented by this case. Although we twice requested the Tax Commission to set a date for oral examination pursuant to the prior order of this Court, they have failed to do so. (*See* Exs. F-G.) Therefore, summary judgment for defendant Commission would be entirely inappropriate at this time on the constitutional issues, where the facts are yet to be explored. (*See* CPLR 3212(f).) The facts in support of plaintiffs' constitutional issues are in the sole possession of the defendant Commission. On the other hand, a determination that summary judgment should be granted to plaintiffs on the issue of law presented by the statutory construction issue, would moot the pending discovery motions as well as the constitutional issues also presented in the complaint.

Therefore, it is respectfully submitted that upon determining the statutory construction issue, this Court should declare that the Circus is a dramatic or musical arts performance, grant summary judgment for the plaintiffs and cause a judgment to be entered adjudging and declaring that the plaintiff Circus is exempt from the provisions of the Tax Law §1105(f)(1), requiring the collection of admissions taxes for circuses and from the parallel provisions of the New York City Administrative Code, §A. 46-2.0(f)(1), and directing that the second cause of action be severed.

S/ Robert Thrun
ROBERT THRUN

Sworn to before me this
23rd day of March, 1977.

S/ Lawrence W. Boes
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-5

AFFIDAVIT OF KENNETH FELD

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } SS.:

KENNETH FELD, being duly sworn, deposes and says:

1. I am the Co-Producer and Executive Vice President in charge of Talent and Production of Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus") and have been employed full-time by the Circus since 1970 in the staging and production of the Circus. I am particularly involved in scouting and searching for new talent and in co-ordinating and supervising the annual rehearsals of the new productions.

2. Ever since 1968, when Mr. Irvin Feld became Circus President and Producer, there have been two separate units of the Circus. Each of these Circus units travels practically year-round across the United States from January to late November or December, and is continually engaged in presenting Circus performances. Each year one of the two separate production units is completely remounted by the Co-Producers, Mr. Irvin Feld and myself, with the assistance of our production staff. Each new unit of the Circus utilizes hundreds of performers and animals in a meld of dramatic, choreographic and musical elements into a new edition of *The Greatest Show On Earth.*

Each production also includes a multitude of props, costumes, aerial rigging and other equipment, all of which must be precisely timed and placed so that each of the Circus' individual acts and production numbers may be staged at the right time and place in the show. After planning the design of each new show, I spend the months from November to February working with Richard Barstow, our Stager and Director, to stage and rehearse one new show at the Circus' Winter Quarters in Venice, Florida and to rehearse and review the other unit.

3. The previous work experience of Richard Barstow, Stager and Director, before he joined the Circus in 1951, included every aspect of staging and directing in various fields of show business from vaudeville to the movies, stage shows and industrial exhibits. He has also written approximately twenty-five songs for use by the Circus.

4. My function as Co-Producer and Executive Vice President Talent and Production for the Circus includes the following: (1) talent searches through Europe, South America and Asia for new acts, (2) attending, co-ordinating and supervising the four weeks of rehearsals held in December and early January for each new production, involving costumes, lighting, props, and rigging and a great variety of other elements, and (3) attending almost 300 Circus performances each year to make sure that the high production standards are maintained and improved. In this production capacity, I work with Don Foote, Costume Designer, William Bellin, Scenic Consultant, William Pruyn, Musical Arranger, Bill Bradley, Choreographer, and Antoinette Concello, Aerial Director, as well as with Mr. Barstow.

5. Just as a repertory company in the theatre continually trains its actors, we also are engaged in a continual training process for performers. For example, each year since 1968 the Circus has sponsored an eight-week session of its famous Clown College, which trains would-be clowns in the dramatic art of comic pantomime.

6. A production of the Circus contains, in my opinion, all of the traditional elements characteristic of a Broadway musical show, for example: instrumental music, songs, written lines for

the Ringmaster/Soloist, dramatic timing of acts and production numbers, and choreography, both human and animal, on the ground and in the air. We employ chorus girls as well as clowns for production numbers; we engage in annual searches for talent; we employ on a full-time basis an outstanding costume designer and design and make as well as purchase costumes; we employ a scenic consultant and lighting experts; and we also employ on a full-time basis a musical arranger, a choreographer and an aerial director. The shoes and boots for Circus performers are supplied by Ballet Makers—Capezio, a world-renowned designer of ballet footwear. Each of our units travels with its own Performance Director and Assistant Performance Director who have the duty of supervising each performance to make sure the Circus maintains the proper pace and quality of performance with which it was staged. Thus, each Circus performance is integrally comprised of dramatic, choreographic and musical elements to form what has always been known as "The Greatest Show On Earth".

S/ Kenneth Feld

KENNETH FELD

Sworn to before me this
21st day of March, 1977.

S/ Mary T. Dean

Notary Public
My Commission Expires: 7/14/79

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-75
AFFIDAVIT OF WILLIAM PRUYN

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.:

WILLIAM PRUYN, being duly sworn, deposes and says:

1. I am the Musical Arranger for Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus"), and from 1969 through 1975 was conductor for the Blue Unit of the Circus, one of the two units of the Circus which present Circus performances across the United States.

2. Whereas the Circus of yesteryear confined its musical selections to the simpler forms of music (marches, gallops, polkas and waltzes), today the increasing sophistication of Circus audiences and performers, as well as the high musical standards of other entertainment media, demand that the Circus music must be of high quality, well-written, well-performed and selected from a great variety of sources, including classical, jazz, rock, film scores and ballet excerpts. During the history of the Circus, a great deal of original music has been composed for the elaborate production numbers which are a hallmark of the Circus as *The Greatest Show on Earth.* The Russian-American composer, Igor Stravinsky, wrote an "Elephant Ballet" for the Circus in 1942; Deems

Taylor wrote a musical suite called "Through the Looking-Glass" inspired by Louis Carroll's book of the same name; other tunes were written for the Circus by such men as Victor Young, Bert Knapp, Henry Sullivan, and long-time Director of the Circus, Mr. Richard Barstow.

3. The musical program of each unit of *The Greatest Show on Earth* requires well over 200 different compositions. As Musical Arranger for the Circus, I make the initial selection of individual pieces used as background music, by choosing various tunes which I feel will best fit the action and by timing each selection to match the appropriate segment of the performers' presentation. I first "sketch" the music for organ and drums and each selection is auditioned at the "run-throughs" prior to opening of each new production of a unit. We hold conferences with the Co-Producers, Messrs. Irvin and Kenneth Feld, to make sure that the music will properly support and enhance each individual act. They and I are also concerned that the overall musical score will be representative of every type of good music, which will please all segments of our audience. It is also important to the Circus that the atmosphere of "Total Circus" always be present in an auditory as well as visual sense. After the musical program has been approved, the orchestrations are written in a bright, brilliant and brassy style. This music is then performed by a band consisting of a conductor and 14 musicians during the hundreds of Circus performances each year.

S/ William Pruyn
WILLIAM PRUYN

Sworn to before me this
23rd day of March, 1977

S/ MARY T. DEAN
Notary Public

My Commission expires 7/14/79.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

LEONARD DUANE EASTER, being duly sworn, deposes and says:

1. I am a resident of the State and City of New York, County of Kings.

2. On September 1, 1977, I purchased one general admission ticket for the evening performance of the Big Apple Circus (hereinafter referred to as the "Circus") at the box office located at Gate No. 1, Battery Park City, New York, New York. The purchase price of said ticket was $5.00.

3. I paid no tax on the price of the said ticket. There was no separate statement or notice of a tax on the price of the said ticket either at the box office or on the ticket which I purchased.

4. I attended the September 1, 1977 evening performance of the Circus. The said performance took place in a single ring, located in a big tent. Spectator seats consisted of bleachers located at the perimeter of the circus ring. Popcorn, peanuts and other refreshments were sold. The performance was presided over by a ringmaster, dressed in white tie and tails. In addition, a small circus band provided the background music for various acts.

5. The circus performance lasted for approximately 1½ hours and consisted of ten separate and distinct acts, interspersed with clown acts and accompanied by background music from the circus band. (See the Circus Program annexed hereto as Exhibit A.) In addition "Los Indianos", a dance troupe, performed a "Sabateo dance with bolas and bambas".

6. In general, the performance consisted of clown acts, tumbling, trapeze acts, juggling and dancing. In short, it was an entertaining circus performance.

S/ LEONARD DUANE EASTER
Leonard Duane Easter

Sworn to before me this 29th day
of September, 1977.

S/ ARTHUR NEEDLEMAN
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-75

AFFIDAVIT OF BILL BRADLEY

DISTRICT OF COLUMBIA } ss.:

BILL BRADLEY, being duly sworn, deposes and says:

1. I am the Choreographer for Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus") and have acted as such since 1967.

2. In my capacity as Choreographer for the Circus, I help create and rehearse the five elaborate production numbers which are included in the Circus, each of which involves major choreographic elements.

3. Early each year I participate in a series of extensive creative meetings with the Producers of the Circus to plan and create the next season's new production. At these meetings, the Producers, the Director and I, together with the Costume Designer and Musical Arranger, decide on themes and all of the other complex details that are involved in the five production numbers.

4. I subsequently spend approximately four full weeks rehearsing the choreographic elements of each new production

before it goes out on its national tour. During this period, I work extensively with the showgirls who perform the many dance routines in the Circus as well as with the other members of the cast, virtually all of whom participate in the production numbers. Many hours are spent each day on the choreographic elements of the show and in coordinating the movements of the dancers, the other performers, the animals and the props into a polished and professional performance.

5. My previous experience in show business includes working with Mr. Richard Barstow in staging night club shows for the *Latin Quarter,* working with such famous choreographers and directors as Jerome Robbins, Agnes De Mille and Elia Kazan, and working as director-choreographer for various European television systems.

S/ Bill Bradley
BILL BRADLEY

Sworn to before me this 17th
day of March, 1977.

S/ MARY T. DEAN
.....
Notary Public

My Commission expires 7/14/79.

Letter Ruling Exempting
Ice Show From Admissions Tax

August 25, 1965

This is in reply to your letter in which you seek a ruling that an ice show is exempt from the admissions tax imposed by Section 1105(f)(1) of the Tax Law, on the basis of its being a "dramatic or musical arts performance", within the terms of the statute.

Section 1105(f)(1) of the Tax Law imposes an admissions tax of 2% upon:

"Any admission charge. . .except charges for admission to . . . dramatic or musical arts performances. . ."

The term "dramatic or musical arts admission charge" is defined in Section 1101(d)(5) as:

"Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

You have requested exemption from the admissions tax on the ground that the ice show is a live choreographic performance and have submitted evidence in your letter and in attached exhibits in support of this claim.

It appears from your letter and exhibits that the programs presented by the ice show consist of carefully conceived and executed, lavishly costumed dance numbers involving also solos and duets and mass performers in ballet, modern dance and musical comedy dances. These dances are performed on skates for the most part, by artists who are talented in the fields of ballet and modern dance. There is a live musical accompaniment which also sometimes includes original compositions. The dance numbers are planned around a central theme and are choreographed, which involves their composition and execution with the aid of sketches indicating the dance patterns and the positions of the individual dancers at every stage of each number's performance. The entire program makes use of all aspects and techniques of a regular Broadway theatrical production including costumes, scenery and lighting.

"Choreography" has been defined as the "art of arranging dances, especially ballet". (Webster's New International Dictionary (2nd edition)). Your letter indicates that ballet is a central feature of the ice show, with both individual performers

and the ensemble, the corps de ballet, having taken intensive training in that dance form; and that, in general, the ice show is in essence, a program of carefully designed dances adapted for presentation on ice.

I am therefore, of the opinion that the ice show constitutes "a live choreographic performance" within the meaning of the law, and that consequently, it is exempt from the admissions tax imposed by the New York State Sales Tax Law.

Very truly yours,

EDWARD H. BEST
Counsel

Supreme Court, U.S.
FILED
JUN 24 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York
100 Church Street
New York, New York 10007
212-566-3327

Gale Zareko,
Arnold Fox,
of Counsel.

June 20, 1980

INDEX

	Page
Preliminary Statement.....	1
Statutes and Regulations.....	4
Questions Presented.....	7
Argument - There is no substantial federal question presented as to whether the tax laws involved, or their enforcement, deny petitioners Equal Protection, Due Process, Freedom of Speach, or any other right under the United States Constitution.....	9
Conclusion.....	20

TABLE OF AUTHORITIES

CASES

	Page
Alaska v. Journal Printing Co., 135 F. Supp. 169 (D. Ct., Alaska, 1955).....	17
Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959).....	10
Ampco Print-Advs. Corp. v. City of N.Y., 14 NY 2d 11, 24 (1964), ap. dism. for want of a substantial fed. qn., 379 U.S. 6 (1964)..	14
Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938)..	17
Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937).....	16
Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890).....	10
Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937).....	11
Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913).....	10
City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953).....	17

Page

City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S.E. 959 (1898)..... 16

Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dism. for want of substantial federal qn. 301 U.S. 670 (1937)..... 17

Insurance Rating Board, Matter of v. Tishelman, 40 AD 2d 765 (1st Dept., 1972)..... 14

Jager, In re, 29 S.C. 438, 7 S.E. 605, 609 (1888)..... 16

Lawrence v. State Tax Comm., 286 U.S. 276, 284 (1932)..... 10

Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946)..... 16

Manufacturers Trust Co., Matter of v. Browne 269 App. Div. 108, 111-112 (1st Dept., 1945), affd. 296 N.Y. 549 (1946)..... 15

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).. 16

Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex., 1896)..... 16

Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938)..... 10

Rast v. Van Deman & Louis, 240 U.S. 342, 357 (1916)..... 11

Page

Shapiro v. City of New York, 32 NY 2d 96, 102 (1973), app. dism. for want of a substantial fed. qn. 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973)..... 14

Southwestern Oil Co. v. Texas 217 U.S. 114, 126 (1910)..... 11

Steinbeck v. Gerosa, 4 N.Y. 2d 302 (1958), ap. dism. for want of a substantial fed. qn. 358 U.S. 39 (1958)..... 17

Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dism. for want of a substantial federal qn. 332 U.S. 749 (1947)..... 17

Thaler v. Murphy, 42 Misc 2d 1 (Sup. Ct., Albany Co., 1964)..... 15

STATUTES

Civil Practice Law and Rules of the State of New York, R3211, subd. e..... 6,20

Tax Law of the State of New York:
Section 1138..... 12
Section 1146..... 14
Section 1147(b)..... 12

Administrative Code of the City of New York:
Section A46-20.0..... 12
Section A46-28.0..... 14
Section A46-29.0(b)..... 12

REGULATIONS

	Page
Regulations of the Tax Commission of the State of New York: Section 527.10	4,13

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The petitioners seek a writ of certiorari to review a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, (reprinted in the appendix to the petition, hereinafter cited as "A.", at page 27a) which unanimously

affirmed, without opinion, an order and judgment of the Supreme Court of the State of New York, County of New York (A., pp. 19a-26a).

Mr. Justice Postel of the latter court wrote an opinion which is not officially reported but appears in the appendix to the petition at pages 4a-16a. The opinion considers and rejects each of petitioners' contentions, except its claim of discrimination against interstate commerce, which had not yet been raised.

The claim of discrimination against interstate commerce, and a request for leave to replead to include such a claim, was first made in a reply affidavit, sworn to February 27, 1978, (six years after service of the complaint on February 4, 1972) in the course of a motion to renew and reargue the decision

of Mr. Justice Postel. Mr. Justice Kirschenbaum of the Supreme Court of the State of New York, County of New York, heard this motion and granted leave to renew, but, on renewal adhered to the decision of Justice Postel and denied petitioners' request for leave to replead. This opinion is not reported but is in the appendix to the petition at pages 17a-18a.

The decision, without opinion, of the Appellate Division, First Judicial Department, is reported at 72 AD 2d 978.

The New York Court of Appeals dismissed petitioners' appeal, taken as of right, upon the ground that no substantial constitutional question is directly involved, and denied petitioners' motion for leave to appeal. The order of the Court of Appeals appears in the appendix to the petition at page 30, and

the decision of that Court, without opinion, is reported at 49 NY 2d 703.

Statutes and Regulations

(1)

Pertinent provisions of the tax statutes are set forth at pages 3-5 of the petition.

Pursuant to these statutes, the State Tax Commission, which administers both the State and City taxes involved herein, has issued regulations with respect to circuses and other arena events [Codes, Rules and Regulations of the State of New York, tit. 20, vol. B, Part 527 (dealing with taxable transactions), §527.10, subds. (b)(1)(ii) and (d)(2), in effect as of September 1, 1976].

Section 527.10(b)(1)(ii) of the Regulations provides the following [2 CCH New York Tax Reporter ¶69-410]:

"(ii) Taxable charges for entertainment or amusement include admissions to sporting events such as baseball or football games, stock car racing, and college athletic events, carnivals, rodeos, circuses and exhibitions.

Example 3: An arena sponsors a show in which trainers conduct various routines with animals, such as trained bears or horses. The admission charge is taxable.

Example 4: An admission charge to a trade show such as a boat, auto or horse show which is open to the public is an admission charge for entertainment or amusement."

Subdivision (d), par. (2) of Section 527.10 of the Regulations provides in pertinent part the following:

"(2) Charges for admission to dramatic or musical arts performances are excluded from tax. Dramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances."

* * *

"Example 5: A show is composed of several acts in which performers dressed as story book characters, appear with musical accompaniment, portray scenes from books, and invite audience participation. This does not qualify as a dramatic or musical arts presentation."

(2)

The Civil Practice Law and Rules of the State of New York provide the following, in pertinent part, with respect to a motion to plead over (R3211, subd. e):

* * *

"Where a motion is made on the ground set forth in paragraph seven of subdivision (a)*, or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a

---

*This ground is that the pleading fails to state a cause of action.

motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave."

Questions Presented

1. Does a tax, imposed as a revenue raising measure upon admission charges to places of amusement, deny equal protection or due process to circuses in contravention of the Fourteenth Amendment to the United States Constitution, where the tax statute exempts from the tax, charges for admission to dramatic or musical arts performances, as defined therein, but not charges for admission to carnivals, rodeos or circuses.

2. Did the Court below properly determine, on the record before it, that the tax laws in question, as applied by the respondents, did not violate or infringe petitioners' constitutional rights under the Equal Protection or Due Process Clauses of the Fourteenth Amendment, or any First Amendment right protected by the Fourteenth Amendment?

3. Did the Court below properly refuse to allow petitioners, six years after serving their complaint, to amend the complaint to include allegations of discrimination against interstate commerce, in light of the requirements of Section 3211(e) of the New York Civil Practice Law and Rules governing such amendments.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED AS TO WHETHER THE TAX LAWS INVOLVED, OR THEIR ENFORCEMENT, DENY PETITIONERS EQUAL PROTECTION, DUE PROCESS, FREEDOM OF SPEACH, OR ANY OTHER RIGHT UNDER THE UNITED STATES CONSTITUTION.

(1)

Petitioners' equal protection argument with respect to the tax statutes, themselves, is that there is no rational basis for excluding circuses from the exemption provided for dramatic or musical arts performances.

However, the record below shows that the reason for this exemption was the financial plight of the legitimate theatre and the fear that a further decline in the number of legitimate theatres would seriously affect hotels, restaurants, taxis, garages and other businesses.

Moreover, Mr. Justice Postel, who originally heard this case, viewed a performance of petitioner Ringling Bros.'

circus at the request of the petitioners. As a result of his viewing, he concluded that the circus, as a matter of fact, was not a dramatic, choreographic or musical performance (A., p. 10a) and, therefore, did not come within the exemption.

Furthermore, the rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm., 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S.

573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Deman & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas 217 U.S. 114, 126 (1910).

(2)

Petitioners' claim of discriminatory enforcement of the tax is equally baseless.

Petitioners' statements (Pet., p. 10) that respondents imposed no tax on the Big Apple Circus and certain other shows is not supported by the record. The reference that petitioners make to the record (A. 45a) is tc an affidavit of a person who

purchased a ticket without being charged a tax.

Any circus or other show subject to the taxes on admissions, which fails to collect the taxes, does so at its peril. Obviously, the State Tax Commission cannot station a State employee at every place of business in the State to insure that the owner of the business complies with the Tax Law.* To impute non-enforcement of the tax from the taxpayer's failure to collect is to ignore the statutory procedure for enforcement which gives the Tax Commission at least three years in which to assess the tax [Tax L., §§1138, 1147(b); Admin. Code, §§A46-20.0, A46-29.0(b)], and is wholly illogical.

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*The taxes in question are part of general sales tax laws applicable to retail stores, restaurants, hotels and various service businesses, as well as to places of amusement.

(3)

Moreover, since September 1, 1976 there have been in effect regulations of the respondent State Tax Commission which expressly treat ice shows, aquatic shows, shows of story book characters in which the audience participates, and similar shows, the same as circuses, i.e., all are taxable under the regulations (See Reg. §527.10, supra,at pp.4-6).

(4)

Petitioners' contention that they have been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute.

Shapiro v. City of New York, 32 NY 2d 96, 102 (1973), app. dism. for want of a substantial fed. qn. 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of N.Y., 14 NY 2d 11, 24 (1964), ap. dism. for want of a substantial fed. qn., 379 U.S. 6 (1964).

Nor did the refusal of the Court below to order additional discovery deprive petitioners of due process.

The respondent Tax Commission had produced exemption rulings requested by petitioners, but not the applications submitted by the taxpayers in support of the request for the exemption rulings. Such materials submitted by taxpayers are protected by the secrecy proivisons of the Tax Law (§1146) and of the New York City Administrative Code (§A46-28.0). Matter of Insurance Rating Board v.

Tishelman, 40 AD 2d 765 (1st Dept., 1972). See also, Matter of Manufacturers Trust Co. v. Browne, 269 App. Div. 108, 111-112 (1st Dept., 1945), affd. 296 N.Y. 549 (1946); Thaler v. Murphy, 42 Misc 2d 1 (Sup. Ct., Albany Co., 1964).

Furthermore, the proceedings below show that petitioners' claim of discriminatory enforcement is frivolous. For example, the petitioners' argument made to Mr. Justice Postel in their brief dated March 23, 1977 (at p. 17), that State and City officials had no objection to a change in the law to exempt circuses, is inconsistent with their claim of intentional or fraudulent discrimination. (See also, Pet., p. 9). Certainly, the veto of this legislation by Governors Rockefeller and Wilson on admittedly revenue grounds (Pet., pp. 9-10) does not

constitute a discrimination violative of the Fourteenth Amendment.

(5)

Petitioners' First Amendment argument is equally frivolous.

The First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S.C. 438, 7 S.E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex., 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S.E. 959

(1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dism. for want of substantial federal qn. 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dism. for want of a substantial federal qn. 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerosa, 4 N.Y. 2d 302 (1958), ap. dism. for want of a substantial fed. qn.

358 U.S. 39 (1958).

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes was economic, as was the Governors' vetoes of bills to exempt circuses.

Different economic factors affect arena shows, such as circuses. For example, they can accomodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

The petitioners' belated claim of discrimination against interstate commerce is based upon one instance of a small, little-known local circus* failing to collect the sales tax on admissions (A., 45a), thereby subjecting itself to liability for the tax.

Mr. Justice Kirschenbaum in the Court below properly refused to permit the petitioners, on their motion to reargue and renew their prior motion for summary judgment, to replead to allege discriminatory enforcement against interstate commerce as they failed to satisfy the Court that they had good ground to

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*Petitioners' own exhibits in the record below (pp. 290-291) show that this one-ring circus, called the "Big Apple Circus" was opened in July, 1977 for a 13-week run in connection with a school for circus performers and could hardly be considered in competition with the petitioner Ringling Bros. circus.

support this proposed cause of action, one of the requirements of the New York practice statute (CPLR,R3211, subd. e, reproduced at pp. 6-7, supra). Moreover, the request to replead was not made in a motion to dismiss on the ground that the pleading failed to state a cause of action, as required by CPLR,R3211, subd. e, but in a reply affidavit in a motion for reargument and renewal of a decision in an earlier motion for summary judgment.

Conclusion

The petition for a writ of certiorari should be denied.

June 20, 1980

Respectfully submitted,

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[K-80]

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In The

Supreme Court of the United States

October Term, 1979

No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself And All Other Taxpayers Similarly Situated,

Petitioners,

against

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENT NEW YORK STATE TAX COMMISSION IN OPPOSITION TO GRANTING CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	*iii*
Preliminary Statement	1
Constitutional Provisions	3
State Statutes	3
Questions Presented	7
Facts	8

ARGUMENT

POINT I — The New York State Tax Law and the Administrative Code of the City of New York, by not excluding circuses from the imposition of sales taxes on admission charges to places of amusement, did not violate the petitioners' rights to free speech, due process and equal protection under the First and Fourteenth amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution.	14
A. *Free Speech*	14
B. *Equal Protection and Due Process*	14
C. *Interstate Commerce Clause*	16
POINT II — The petitioners have not demonstrated that there has been an arbitrary and discriminatory application of the tax law and therefore is not entitled to discover tax returns and reports of other taxpayers.	17
CONCLUSION — Petitioners' application for a writ of certiorari should be denied	18

Page

APPENDIX

Order of Justice Postel, Dated March 23, 1976 . . . . . A-1

Order of Justice Postel, Dated March 23, 1976 . . . . . A-3

Decision of Justice Postel, Dated August 10, 1977 . . . . . A-4

Decision of Justice Kirschenbaum, Dated April 18, 1978 . A-17

TABLE OF AUTHORITIES

Cases:	Page
Allied Stores of Ohio v. Bowers, 358 US 522	15
Ampco Print—Advs. Corp. v City of New York, 14 NY2d 11, app dsmd 379 US 5	16
Arizona Pub. Co. v. O'Neil, 22 F Supp 117, affd 304 US 543	14
Armour & Co. v Virginia, 246 US 1	15
Associated Press v National Labor Relations Board, 301 US 103	14
Bell's Gap R'd Co. v Pennsylvania, 134 US 232	14
Bradley v Richmond, 227 US 477	15
Brown-Forman Co. v Kentucky, 217 US 563	15
Carmichael v Southern Coal Co., 301 US 495	15
Charlestown Assn. v Alderson, 324 US 182, rehr den 324 US 888	15, 16
Citizens' Telephone Co. v Fuller, 229 US 322	15
Cook v Marshall County, 196 US 261	15
Heisler v Thomas Colliery Co., 260 US 245	15
In re Jager, 29 SC 438, 7 SE 605	14
Lawrence v State Tax Comm., 286 US 276	15
Mabee v White Plains Publishing Co., 327 US 178	14
Mackey Telegraph Co. v Little Rock, 250 US 94	15
Matter of New York State Department of Taxation and Finance v New York State Department of Law, Statewide Organized Crime Task Force, 44 NY2d 575	17
Oklahoma Press Publishing Co. v. Walling, 327 US 186	14

Page

Oliver Iron Co. v. Lord, 262 US 172 15

Rapid Transit Corp. v New York, 303 US 573 15

Rast v Van Demand & Louis, 240 US 342 15

Rowley v Chicago & N.W. Ry., 293 US 102, rehr den 293 US 632 16

Shapiro v City of New York, 32 NY2d 96, app dsmd 414 US 804, pet for rehr den 414 US 1087 16

Singer Sewing Machine Co. v Brickell, 233 US 304 15

Snowden v Hughes, 321 US 1, rehr den 321 US 804 15

Southwestern Oil Co. v Texas, 217 US 114 15

Steinbeck v Gerpsa, 4 NY2d 302, app dsmd 358 US 39 . . . 14

Sunday Lake Iron Co. v Wakefield, 247 US 350 15

New York City Statutes:

New York City Administrative Code

Article 46, Title A 1, 6

§ A 46-1.0(d)(5) 2, 7

§ A 46-2.0(f)(1) 2, 6, 8, 16

§ A 46-7.0(d)(2)(B) 7

New York State Statutes:

Public Officers Law, § 87(2) 5

Tax Law, Article 28 . . . . . 1, 3, 7, 9

Tax Law, Article 29 7

Tax Law, § 1101(d)(5) 2, 3

Page

Tax Law, § 1105(f)(1) 2, 3, 8, 16

Tax Law, § 1116(d)(2)(B) 4

Tax Law, § 1146(a) 4

United States Constitution:

Article I, § 8, cl 3 . . . . . 2, 3, 7

First Amendment 2, 3, 7, 14

Fourteenth Amendment, § 1 . . . . . 2, 3, 7

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BRIEF FOR RESPONDENT NEW YORK STATE TAX COMMISSION IN OPPOSITION TO GRANTING CERTIORARI

Preliminary Statement

The respondent New York State Tax Commission submits this brief in opposition to the petitioners' application to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which unanimously affirmed without opinion the order and judgment of the Supreme Court, New York County. The Supreme Court order and judgment *inter alia* declared (1) that admission charges to circuses presented in New York State are subject to sales taxes under New York Tax Law, Article 28 and to Title A of Article 46 of the Administrative Code of the City of New York when presented in New York City; (2) that circuses are not exempt from the taxes as "dramatic or musical arts performances" or as "a live, dramatic, choreographic or musical performance" within

the meaning of the New York State Tax Law, §§ 1105(f) (1) and 1101(d) (5) and the New York City Administrative Code, §§ A 46-2.0(f) (1) and A 46-1.0(d) (5); (3) that the taxes on their face and as applied to the petitioners do not violate nor infringe on the petitioners' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, Section 1, the Due Process Clause of the Constitution nor the First Amendment to the Constitution; (4) denied the petitioners' motion for leave to replead by alleging that the respondents have discriminated against interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution; and (5) on rehearing adhered to a decision denying a motion for discovery of documents sought to show selective enforcement of the Sales Tax laws on the grounds that the petitioners have failed to demonstrate the existence of the triable issue as to any intentional and invidious plan of discrimination on the part of the respondents and at most all that the petitioners have shown is mere nonenforcement of the statute against others similarly situated.

On February 20, 1980 the New York Court of Appeals denied the petitioners' motion for leave to appeal to that Court (49 NY2d 703) and dismissed their appeal on the ground that no substantial constitutional question is directly involved (49 NY2d 800). The petition to this Court for a writ of certiorari was received by the New York Attorney General on May 27, 1980.

On November 20, 1979 the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, had unanimously affirmed without opinion the order and judgment of the Supreme Court of the State of New York (New York County) entered on June 9, 1978 (72 AD2d 978).

Constitutional Provisions

The relevant provisions of the United States Constitution are: Amendment Fourteen, Section 1, the Due Process and Equal Protection Clauses; Amendment One, the Freedom of Speech Clause; and Article I, Section 8, clause 3, the Commerce Clause.

State Statutes

A. New York State Tax Law, Article 28, entitled "Sales and Compensating Use Taxes" (enacted by Laws of 1965, ch 93, effective August 1, 1965):

1. New York State Tax Law, § 1105, entitled "Imposition of sales tax", subd (f) (1):

> "* * * *there is hereby imposed* and there shall be paid *a tax of four percent upon*:[*]
>
> * * *

"(f) (1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the state, except charges for admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools * * *." (Emphasis added.)

2. New York State Tax Law, § 1101, entitled "Definitions", subd (d) (5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a*

*The originally enacted rate was two percent. The rate was increased to three percent effective April 1, 1969 and was again increased to four percent effective June 1, 1971.

live dramatic, choreographic or musical performance." (Emphasis added.)

3. New York State Tax Law, § 1116, entitled "Exempt organizations", subd (d) (2) (B):

"(2) The exemption provided in paragraph (1) of this subdivision [exempting admission charges to amusements for the benefits of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:

* * *

(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation."

4. New York Tax Law, § 1146 entitled "Returns to be secret" subd (a):

"§ 1146. Returns to be secret

"(a) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the tax commission pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report. The officers charged with the custody of such returns and reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the tax commission is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the returns, reports or facts shown thereby are directly

involved in such action or proceeding, in any of which events the court may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. The tax commission may, nevertheless, publish a copy or a summary of any decision rendered after a hearing required by this article. Nothing herein shall be construed to prohibit the delivery to a person who has filed a return or report or his duly authorized representative of a certified copy of any return or report filed in connection with his tax or to prohibit the publication of statistics so classified as to prevent the identification of particular returns or reports and the items thereof, or the inspection by the attorney general or other legal representatives of the state of the return or report of any person required to collect or pay the tax who shall bring action to review the tax based thereon, or against whom an action or proceeding under this chapter has been recommended by the commissioner of taxation and finance or the attorney general or has been instituted, or the inspection of the returns or reports required under this article by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by a person required to collect or pay the tax under this article."

B. New York Public Officers Law, Article 6, entitled "Freedom of Information Law" enacted in 1944 and as amended in 1977:

1. New York Public Officers Law, § 87, formerly § 88, entitled "Access to agency records", subd 2:

"2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

"(a) are specifically exempted from disclosure by state or federal statute:

* * *

"(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public; or
iii. final agency policy or determinations; * * *"

C. Administrative Code of the City of New York, Chap 46, Title A, entitled "Sales and Related Taxes", (enacted by Local Law 1965, No. 73, July 22, 1965, effective August 1, 1965)*

1. Administrative Code § A46-2.0, entitled "Imposition of sales tax", subd (f) (1):

"* * * there is hereby imposed within the City of New York and there shall be paid a tax upon the receipts, rents, dues and charges specified in the following subdivisions (a), (b), (c), (d), (e), and (f) at the rate of four percent * * *[**]

"(f) (1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the City of New York, except charges for* [admissions] *admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools * * *."

(Emphasis added.)

*Effective June 10, 1975, after this action was commenced, the City's sales tax (including the admissions tax) was suspended by Tax law, § 1210(f) and replaced by a State tax imposed by Tax Law, § 1107 at the rate of four percent and identical, in relevant part, to the taxes imposed by Tax Law, § 1105. This State tax is to terminate upon payment of Municipal Assistance Corporation obligations, and the City tax is then to resume (Tax Law, §§ 1107[d] and 1210[i].)

**The originally adopted rate was three percent. The rate was increased to four percent effective July 1, 1974.

2. Administrative Code, § A46-1.0, entitled "Definitions", subd (d) (5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic or musical performance.*" (Emphasis added.)

3. Administrative Code, § A46-7.0, entitled "Exempt organization" subd (d) (2) (B):

> "(2) The exemption provided under paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:
>
> * * *
>
> "(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation * * *."

Questions Presented

1. Do the New York State Tax Law and the Administrative Code of the City of New York by not excluding circuses from the imposition of sales taxes on admission charges to places of amusement in New York State and New York City violate the petitioners' rights to free speech, due process and equal protection under the First and Fourteenth Amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution?

2. Were the petitioners deprived of the due process of law where they have not been given a right to discover tax returns and reports filed with the New York State Tax Commission under Articles 28 and 29 of the New York Tax Law where under the Tax Law the information which the returns and reports

contained cannot be disclosed, and at most the petitioners have shown mere nonenforcement of the Tax Law against others similarly situated?

Facts

The petitioner Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (Ringling Bros.) is in the business of presenting performances of the Ringling Bros. circus which includes traditional live circus acts such as clown, high-wire and trapeze, animal, teeterboard, perch, jugglers, unicyclists, tumblers and horsemen and other acts. The petitioners alleged in their complaint to the New York Supreme Court that these various acts include dramatic choreographic and musical elements and include "five production number extravaganzas which combine musical selections with a choreographic procession of circus performers in various costumes built around a central dramatic theme".

The petitioner Ruth E. Lutzic in her complaint alleged that she purchased for herself and her family tickets for a performance of Ringling Bros. Circus in the City and State of New York and paid the six percent sales tax payable to the respondents pursuant to section 1105 (f) (1) of the Tax Law of the State of New York and section A46-2.0 (f) (1) of the Administrative Code of the City of New York.

Performances of the circus were presented in New York City and other cities in the State of New York at various times in the period from 1966 through 1971.

The petitioners sought in their action, *inter alia*, a declaratory judgment that:

> "(a) adjudging and declaring that Section 1105(f) (1) of the Tax Law of the State of New York, pertaining to the imposition of a sales tax on admission charges, cannot lawfully be applied to admission charges for the Ringling Bros. Circus;

> "(b) in the alternative, adjudging and declaring that Section 1105(f) (1) of the Tax Law of the State of New York, on its face and as applied, is void and unconstitutional, insofar as it imposes a sales tax on admission charges to the Ringling Bros. Circus, while exempting therefrom all other dramatic and musical arts productions; * * *"

The summons and complaints were served upon the respondent New York State Tax Commission on February 4, 1972.

Answers were served by the respondents, the State Tax Commission and the City of New York, which denied allegations made in the complaint and also asserted affirmative defenses. These defenses alleged:

(a) that the petitioners are prohibited from bringing these actions because the provision of the Tax Law limit the remedies available to them;

(b) the taxes which were paid were paid voluntarily and not under protest or duress and no recovery of them can be had;

(c) no timely demand or claim for the taxes sought to be recovered had been made; and

(d) the petitioner Ringling Bros. had not paid to the State Tax Commission taxes which it had collected.

The respondents demanded a judgment declaring that the admission charges to the circus performance of Ringling Bros. are subject to the taxes imposed by Article 28 of the Tax Law and the Administrative Code of the City of New York for all periods involved in this action and that the taxes do not violate provisions of the New York State and the United States Constitutions, together with other relief as may be proper.

On June 6, 1975 the petitioners moved for an order compelling the State Tax Commission to appear at an examination before trial and to produce certain documents in its possession. On June

10, 1975, the State Tax Commission moved for a protective order seeking a nonproduction of the documents.

On March 23, 1976, orders of Mr. Justice POSTEL at Special Term of the Supreme Court, New York County, were filed. The orders denied that part of the petitioners' motion for an order compelling production of specified documents and granted the Commission's cross-motion for a protective order with respect thereto, stating:

> "The documents sought are 'secret' and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N Y 2d 113)."

The order further granted the part of the petitioners' motion for an examination before trial. The examination before trial was adjourned *sine die*. No appeals from the orders were taken.

On January 3, 1977, the petitioners moved for an order granting them leave to renew their motion for an order compelling the State Tax Commission to produce documents in its possession relating to "the request for and preparation, and consideration of the opinion and ruling dated January 2, 1976 of Peter Crotty, Esq., Deputy Commissioner and counsel to the respondent Commission revoking its prior rulings exempting ice shows from sales taxes".

On January 20, 1977, the State Tax Commission moved for a further protective order and for summary judgment and the petitioners cross-moved for summary judgment. The City of New York supported the State Tax Commission's motion and opposed the petitioners' cross-motion for summary judgment.

On August 10, 1977, Mr. Justice POSTEL, after viewing the Ringling Bros. Circus, issued an opinion (reported in New York Law Journal on August 16, 1977) in which he held:

(a) that the admission charges to Ringling Bros. Circus were not exempt from sales taxes and found that the performances were not dramatic, choreographic or musical performances exempt from the tax;

(b) the petitioners were not deprived of due process of law;

(c) the petitioners' claim of discriminatory enforcement of the Sales Tax Law was not warranted;

(d) Ringling Bros. Circus claim that its First Amendment rights had been abridged is without merit; and

(e) therefore, the petitioners' cross-motion for leave to renew and the State Tax Commission's cross-motion for a protective order were academic.

The Court in dismissing the second cause declared that "the plaintiff circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charge to the circus" and otherwise denied the motions. He held that a circus is a unique form of entertainment, stating:

> "A circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5) (of the Administrative Code of the City of New York). * * * The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic and musical arts performances."

The Court also held that petitioners' constitutional arguments are without merit; the constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles; if

> "any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time the statute was enacted, the tax law will be upheld"

and likewise the petitioners' claim of discriminatory enforcement was also held not warranted. The Court said (13a):

> "The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.
>
> "It merely alleges that no sales tax has been required by the defendants to be paid 'upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, and other shows, all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances.'
>
> "At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not alleged [sic] willfulness or fraud."

It added (14a):

> "Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.
>
> • • •
>
> "Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed."

The New York Supreme Court (KIRSCHENBAUM, J.), in its decision dated April 18, 1978, denied the petitioners' motion to renew and reargue the decision of Mr. Justice POSTEL (then retired) dated August 10, 1977 for want of a sufficient showing that the Court overlooked or misconstrued any material principles of law or fact. With regard to that part of the petitioners' motion seeking renewal of their argument based upon alleged "newly discovered events" the Court said:

> "Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of

> discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough."

The Court thereupon adhered to Mr. Justice POSTEL's decision.

The Court also denied the petitioners' motion to replead, stating:

> "They have failed to satisfy this Court that they have good ground to support their cause of action for alleged discriminatory enforcement against interstate commerce (see CPLR § 3211 subd. e; ATI, Inc. v Ruder & Finn, Inc., 42 N Y 2d 454, 461)." (18a)

On February 3, 1978, the petitioners moved for leave to renew and reargue the decision of Justice POSTEL. The motion was opposed by the respondents.

On February 9, 1978, the State Tax Commission moved for an order for summary judgment upon the decision of Mr. Justice POSTEL. The petitioners opposed the motion until after their motion to renew and reargue was decided.

On April 18, 1978, Mr. Justice KIRSCHENBAUM issued a decision upholding the decision of Mr. Justice POSTEL after granting leave to renew the argument of Mr. Justice POSTEL's decision. An order on the decision here was entered in the office of the Clerk of the County of New York.

ARGUMENT

POINT I

The New York State Tax Law and the Administrative Code of the City of New York, by not excluding circuses from the imposition of sales taxes on admission charges to places of amusement, did not violate the petitioners' rights to free speech, due process and equal protection under the First and Fourteenth amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution.

A. *Free Speech*

The First Amendment does not grant immunity from the application of general laws. *Associated Press v National Labor Relations Board*, 301 US 103, 132 (1937); *Mabee v White Plains Publishing Co.*, 327 US 178, 184 (1946); *Oklahoma Press Publishing Co. v Walling*, 327 US 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. *In re Jager*, 29 SC 438, 7 SE 605, 609 (1888); *Arizona Pub. Co. v O'Neil*, 22 F Supp 117 (D Ct, Ariz, 1938), affd 304 US 543 (1938).

Even authors have been held subject to business taxes on receipts from licensing their works. *Steinbeck v Gerpsa*, 4 NY2d 302 (1958), app dsmd for want of a substantial fed ques 358 US 39 (1958). The taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

B. *Equal Protection and Due Process*

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles. The rule is elementary that a tax need not follow a pattern of rigid uniformity. *Bell's Gap R'd Co. v Pennsylvania*, 134 US 232,

237 (1890); *Lawrence v State Tax Comm.*, 286 US 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." *Citizens' Telephone Co. v Fuller*, 229 US 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. *Allied Stores of Ohio v Bowers*, 358 US 522, 528 (1959); *Rapid Transit Corp. v New York*, 303 US 573, 578 (1938); *Carmichael v Southern Coal Co.*, 301 US 495, 509 (1937); *Rast v Van Demand & Louis*, 240 US 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. *Southwestern Oil Co. v Texas*, 217 US 114, 126 (1910). (See, also, *Cook v Marshall County*, 196 US 261, 274-275 [1905]; *Brown-Forman Co. v Kentucky*, 217 US 563, 573 [1910]; *Singer Sewing Machine Co. v Brickell*, 233 US 304 [1914]; *Heisler v Thomas Colliery Co.*, 260 US 245 [1922]; *Oliver Iron Co. v Lord*, 262 US 172 [1923]; *Armour & Co. v Virginia*, 246 US 1 [1918]; and *Bradley v Richmond*, 227 US 477 [1913].)

Petitioners' claim of discriminatory enforcement is also not warranted. The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. *Snowden v Hughes*, 321 US 1, 8 (1944), rehr den 321 US 804 (1944).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. *Charlestown Assn. v Alderson*, 324 US 182, 190-191 (1945), rehr den 324 US 888 (1945); *Sunday Lake Iron Co. v Wakefield*, 247 US 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. *Mackay Telegraph Co. v*

Little Rock, 250 US 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose to disregard the principle of uniformity. *Rowley v Chicago & N.W. Ry.*, 293 US 102, 111 (1934), rehr den 293 US 632 (1934). The burden of proof is on the taxpayer. *Charlestown Assn v Alderson, supra*, 324 US 182, 191 (1945).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection. It merely alleges that no sales tax has been required by the respondents to be paid "upon admission charges to the Walt Disney arena show ('Disney On Parade'), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances." At most it amounts to an allegation that the respondent Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Petitioners' contention that it has been deprived of due process of law has nothing to support it. As the taxes in issue here were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. *Shapiro v City of New York*, 32 NY2d 96, 102 (1973), app dsmd for want of a substantial fed ques, 414 US 804 (1973), pet for rehr den 414 US 1087 (1973); *Ampco Print-Advs. Corp. v City of New York*, 14 NY2d 11, 24 (1964), app dsmd for want of a substantial fed ques, 379 US 5 (1964).

C. *Interstate Commerce Clause*

There can be no question of discrimination against interstate commerce in this matter because the tax applies only to admissions to places of amusement within the State of New York, in the case of the State tax (Tax Law, § 1105[f][1]), and within the City of New York, in the case of the City tax (Admin Code, § A46-2.0[f][1]). In other words, the incidence of the tax is purely

intrastate, and petitioner Ringling Bros., insofar as its circus performances are concerned, is doing a strictly intrastate business.

POINT II

The petitioners have not demonstrated that there has been an arbitrary and discriminatory application of the tax law and therefore is not entitled to discover tax returns and reports of other taxpayers.

Mr. Justice POSTEL in his order dated March 23, 1976 denied the petitioners' motion to discover tax returns and reports filed with the New York State Tax Commission on the basis that:

> "The documents sought are 'secret' and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y.2d 113)." (A-2)

The force of these secrecy provisions of New York Tax Law, § 1146 are discussed in *Matter of New York State Department of Taxation and Finance v New York State Department of Law, Statewide Organized Crime Task Force,* 44 NY2d 575 (1978). Although the order of March 23, 1976 was appealable, no appeal was taken and at that juncture became the law of the case.

On renewal of the petitioners' motion for discovery based on newly discovered events, Mr. Justice KIRSCHENBAUM in his decision dated April 18, 1978 pointed out and made the following findings:

> "In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she

> nor the State Tax Commission was aware of the existence of the 'Big Apple Circus', a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough." (A-18)

Accordingly it is submitted that the petitioners have failed to show that there has been unconstitutional discrimination in the enforcement of the New York State Tax Law.

CONCLUSION

Petitioners' application for a writ of certiorari should be denied.

Dated: Albany, New York
June 17, 1980

Respectfully submitted,

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of Counsel

APPENDIX

ORDER OF JUSTICE POSTEL, DATED MARCH 23, 1976

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 7 read on this motion, SUBMITTED

	Papers Numbered
No. 72 on Calendar of Oct. 29, 1975	
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-7
Answering Affidavit	
Replying Affidavit	
Affidavit	
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion # 73 this date.

Order of Justice Postel, Dated March 23, 1976

Motions numbered 72 and 73 on the calendar of October 29, 1975, are consolidated for disposition and disposed of as follows:

That branch of the motion by plaintiff for an order compelling production of specified documents is denied, and the cross motion for a protective order as regards the aforesaid production is granted.

The documents sought are "secret" and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y. 2d 113).

The part of the motion for an order directing an examination before trial is granted, and the part of the cross motion for an order denying said examination before trial is denied.

The examination shall take place at Special Term, Part II of this court at 10 A.M., on March 29, 1976, or as agreeable to the parties. All rulings necessary with respect to said examination before trial shall be referred to the justice presiding thereat.

Dated March 23, 1976 S/.....
J.S.C.

Briefs: Plaintiff's xx Defendant's x Petitioner's Respondent's Relator's Briefs

County Clerk's No. 10219, 1975
Spec I Liber R73 Line 9, 1975

ORDER OF JUSTICE POSTEL, DATED MARCH 23, 1976

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 6 read on this motion, SUBMITTED

No. 73 on Calendar of Oct 29, 1975

	Papers Numbered
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-5
Answering Affidavit	
Replying Affidavit	
Affidavit of Service	6
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion #72 this date.

Upon the foregoing papers this motion is disposed of in accordance with decision rendered in companion motion numbered 72 on the calendar of October 29, 1975.

Dated March 23, 1976

Filed
Mar 23 1976
New York
Co. Clerk's Office

County Clerk's No. 10219, 1975
Spec I Liber R-76 Line 1, 1975

S/.....
J.S.C.

DECISION OF JUSTICE POSTEL, DATED AUGUST 10, 1977

SUPREME COURT: NEW YORK COUNTY

SPECIAL TERM: PART I

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

POSTEL, J.:

Plaintiffs move pursuant to CPLR 2221 for leave to renew the prior order of this court which denied their motion for an order directing the defendant New York State Tax Commission (hereinafter referred to as "Commission") to produce certain documents. The Commission cross-moves for a protective order pursuant to Article 31 of the CPLR, vacating plaintiffs' notice and denying production of the documents referred to therein; and also for an order pursuant to CPLR 3212 dismissing the complaint herein and directing that judgment be entered herein in favor of the Commission on the grounds that the action has no merit as a matter of law.

Plaintiffs cross-move for summary judgment granting a declaratory judgment adjudging that the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of the New York State Tax Law and from the provisions of the Administrative Code of the City of New York, which require the collection of state and city sales taxes on admission charges, and directing that the second cause of action be severed.

This is an action for a declaratory judgment wherein plaintiffs seek an adjudication that the annual performances at the Madison Square Garden Center and elsewhere in New

York State presented by the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (the "Circus") are exempt from the provisions of the New York State Tax Law and the New York City Administrative Code requiring the collection of admissions taxes for certain types of public entertainment as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law §§1105 [f][1], 1101 [d][1]; N.Y.C. Admin. Code §§A46-2.0 [f][1]; A46-1.0 [d][5]).

The circus and its coplaintiff, Ruth E. Lutzic, who purportedly sues on her own behalf as a taxpayer and circus patron and for all others similarly situated as a class, contend that the Circus presents live "dramatic or musical arts performances" within the meaning of the exemption provided in section 1105 (f)(1) of Article 28 of the Tax Law, which also defines a "dramatic or musical arts admission charge" in section 1101 (d)(5) as one charged for "admission to a theatre, opera house, concert hall, or other hall or place of assembly for a live, dramatic, choreographic or musical performance."

Therefore, plaintiffs argue the Circus is exempt from the collection of the state and city taxes on admission charges.

Defendant City of New York says that the admission charges to performances of the plaintiff circus are subject to state and city sales tax and have been subject to such taxes for all periods involved in this action. The city tax provisions in question are identical with the state tax provisions, so that judgment for one defendant would require judgment for the other.

As additional second and third grounds of the first cause of action for declaratory judgment, plaintiffs contend that the statutes in question are arbitrarily, capriciously, and unconstitutionally applied in that other entertainment extravaganzas similar to the circus, such as ice shows and "Disney on Parade," have been granted administrative exemptions from the collection of admission taxes under the above sections of the Tax Law, and that the statutes, if construed as the defendants urge, are unconstitutional on their face. These constitutional grounds based on the Equal Protection and Due Process provisions of both the United States and the New York State Constitutions, as well as on the First Amendment, present, say the plaintiffs,

factual questions which cannot and should not be decided by summary judgment. These secondary contentions therefore preclude defendants' cross-motion for summary judgment and need not be reached if the court grants plaintiffs' motion based on the statute issue.

However, the defendants say that the plaintiffs' argument with respect to discriminatory enforcement of the tax statutes does not preclude the granting of summary judgment to the defendants city and state at this time, as plaintiffs contend, because, as a matter of law, the complaint does not allege the kind of discrimination that constitutes a denial of equal protection. Only a purposeful, invidious, intentionally unfair discrimination in enforcement of a statute may amount to a denial of equal protection. Plaintiffs merely allege that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

Plaintiffs' complaint also contains a second cause of action for a refund to plaintiffs and members of the class of circus patrons of taxes previously paid for admission to the circus. This cause of action is not involved in the present cross-motions. Plaintiffs request that if summary judgment is granted to them on the first cause of action for a declaratory judgment, the two causes of action should be ordered severed pursuant to CPLR 3212 (e) (1). If summary judgment is granted to defendant on the first cause of action, the second cause of action necessarily fails.

Therefore, the primary issue presented by defendant's and plaintiffs' cross-motion is whether the Circus is subject to the state and city sales taxes on admissions.

The city tax involved herein is part of the City Sales Tax Law contained in Title A of Chapter 46 of the New York City Administrative Code. It is imposed pursuant to the authority granted to cities in Article 29 of the State Tax Law (Tax Law, §1210 [a]) to impose the taxes described in Article 28 of the Tax Law. Article 28 is the State Sales Tax Law and contains

the provisions of the state tax also involved in this action. The enabling act for the city tax requires that the city tax be identical with the state tax except in some limited respects not relevant to this action (Tax Law §1210 [a]).

The city tax in question (Admin. Code, §A46-2.0[f][1])* is imposed upon

> "(f) (1) *Any* admission charge where such admission charge is in excess of ten cents to or for the use of *any* place of amusement in the city of New York, *except charges for admission* to racetracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances,* or motion picture theatres, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools." (Emphasis supplied.)

"Place of amusement" is defined as follows (Admin. Code, §A46-1.0[d] [1-0] corresponding to Tax L., §1101[d] [10]):

> "(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided."

Plaintiffs claim that the Circus falls within the statutory exemption provided in Section A46-2.0(f) (1) of the Code and Section 1105(f) (1) of the Tax Law for "dramatic or musical arts performances," which are defined as follows (Admin. Code, §A46-1.0[d] [5] corresponding to Tax L., §1101[d] [5]):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a *live dramatic, choreographic or musical performance.*" (Emphasis supplied.)

Thus, on its face, the exemption applies to admissions to performances of the kind which are commonly regarded as part of the dramatic or musical arts and which are customarily given in theatres, opera houses, concert halls and similar places.

---

* This is the same in substance as Tax Law, section 1105(f)(1) except that the latter is statewide.

Obviously, the performance must be predominantly one of the dramatic or musical arts.

The Circus is a unique form of entertainment, customarily performed in a tent or arena.

It has been defined as follows:

> "2a. A circular enclosure surrounded by tiers and seats and usually covered by a large tent, for the exhibition of feats of horsemanship, acrobatic performances, etc. Also, the company of performers with their equipage or the performance itself." Webster's New International Dictionary of the English Language—2d ed., unabridged (G. & C. Merriam Co., 1947), p. 490.

Funk and Wagnalls dictionary defines "circus" as "1. A show in which feats of horsemanship, tumbling, strength, etc., are exhibited." (The Practical Standard Dictionary of the English Language [Funk & Wagnalls Co., 1931], p. 224.)

Everyone is familiar with the traditional circus acts, which are primarily feats of physical skill, strength and daring, interspersed with clowns for comic relief and trained animals.

It seems apparent, therefore, that a circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5).

However, were there room for doubt, it would be dispelled by section A46-7.0(d) (1) of the Administrative Code (corresponding to Tax Law, §1116 [d][1]).

Section A46-7.0(d) (1) exempts from the tax admissions which are otherwise taxable but whose proceeds inure exclusively to the benefit of various religious, charitable, educational, and governmental organizations. It provides the following:

> "(d) (1) Except as provided in paragraph (2) of this subdivision, any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section A46-2.0 . . . ."

The paragraph (2) referred to in the provision above states in pertinent part (Admin. Code, §A46-7.0[d] [2]):

> "The exemption provided under paragraph (1) of this subdivision shall not apply in the case of admissions to:
>
> * * * *
>
> "(B) Carnivals, rodeos, or *circuses* in which any professional performer or operator participates for compensation . . . ." (emphasis supplied)

Accordingly, even in situations where an admission charge would be exempt because it inured to the benefit of an exempt organization, the Legislature has explicitly provided that circuses are not to be included in that exemption where any professional performer or operator participates for compensation.

The legislative history of the exemption for dramatic or musical arts performances supports the conclusion that circuses do not come within the exemption.

The provisions of the state and city sales tax laws involved in this action derive from the former City Admissions Tax imposed by Title G of Chapter 46 of the Administrative Code.

The exemption for dramatic or musical arts performances, like that for motion pictures, was based upon economic hardship.

High costs had drastically cut the number of theatres and the number of productions in the city. The 1960 season had been the most disastrous year on Broadway. It was feared that without relief from the tax on admissions not only would the legitimate theatre industry further decline but that the city's economy would be seriously affected because of the impact of such decline on hotels, restaurants, taxis, garages and other businesses in the city.

Similarly the concert stage, opera and ballet needed relief. Accordingly, the admissions tax was amended by Local Law No. 72 of 1961 to except dramatic or musical arts performances from the tax.

The amendment, in defining "dramatic or musical arts admission charge," expressly excluded circuses, along with ice

shows and aquashows, from the definition (Admin. Code, §G46-1.0(3a), as added by L.L. No. 72 of 1961, §1).

When the state sales tax was enacted (Tax. L., Art. 28, as added by L. 1965, ch. 93), the express exclusion of circuses, ice shows and aquashows in the definition of "dramatic or musical arts admission charge" was dropped as surplusage (Tax Law, §1101 [d] [5]). As the city tax imposed by Title A of Chapter 46 of the Administrative Code was required to be substantially identical with the state tax, the express exclusion of circuses, ice shows, and aquashows was dropped from the corresponding definition in the city tax.

Further, a viewing of the circus shows that it is not a "drama,"** that the music is background music, subsidiary to the circus acts, and that the choreographic elements are incidental, being performed by persons seemingly chosen for their athletic ability in climbing ropes and riding elephants rather than training in the dance.

In short, the performance is that of a beautifully customed, well-produced circus.

The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic or musical arts performances. But, should there be any doubt, this doubt must be resolved in favor of defendants.

The rule is well established that a tax exemption is never presumed or inferred; the taxpayer must bring himself clearly within its ambit, for a tax exemption will not be granted unless its terms plainly and unequivocally apply and will not be recognized in case of any doubt. Matter of Young v. Bragalini, 3 N.Y.2d 602, 605, 606 (1958); Matter of Schwartzman, 262 App. Div. 635, 636 (3d Dept. 1941) affd. 288 N.Y. 568 (1942); People v. Brooklyn Garden Apartments, 283 N.Y. 373, 380 (1940); City of Rochester v. U.F.S. Dist. No. 4 of Livonia,

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** "Drama" is defined as "1. A composition, now usually in prose, arranged for enactment, and intended to portray life or character or to tell a story by actions and, usually, dialogue tending toward some result based upon them; a play. It is designed or composed as though designed, to be performed by actors on the stage." Webster's New International Dictionary of the English Language, 2d ed., unabridged (G. & C. Merriam Co., 1947), p. 782.

255 App. Div. 96, 102 (4th Dept. 1938); Matter of Bd. of Education, Jamestown v. Baker, 241 App. Div. 574, 575-576 (4th Dept. 1934), affd. 266 N.Y. 636 (1935); People ex rel. 300 Park Avenue, Inc. v. Goldfogle, 225 App. Div. 356, 359 (1st Dept. 1929).

In light of the multitude of tax cases dealing with similar arguments, plaintiffs' constitutional arguments are without merit.

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles.

The rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm. 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Demand & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas, 217 U.S. 114, 126 (1910).

One of the clearest statements of just how far the Legislature may go in classifying for tax purposes is to be found in People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906), affirmed 204 U.S. 152 (1907). The court stated the general proposition as follows (p. 443):

> "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it

is unreasonable, but that does not make it unconstitutional, even if the result is double taxation."

It went on to point out that (p. 445):

"The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. . . ."

Thus, in Cook v. Marshall County, 196 U.S. 261, 274-275 (1905), a distinction between wholesale dealers and retail dealers for tax purposes was upheld. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910), a license tax which taxed rectifiers and blenders of distilled spirits was upheld, although the tax did not apply to distillers who did not rectify or blend their liquor. The case of Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), sustained a tax on wholesale dealers in certain specified articles although it did not tax wholesale dealers in other articles.

In Singer Sewing Machine Co. v. Brickell, 233 U.S. 304 (1914), a tax was found valid although it was imposed on the business of selling sewing machines by traveling salesmen and was not imposed on the selling of such machines at an established place of business. It is proper to tax anthracite coal and not tax bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). The mining of iron ore where carried on by the owner may be taxed, while exempting such business if carried on by contractors. Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Different tax treatment may be accorded to different classes of private bankers. Bradley v. Richmond, 227 U.S. 477 (1913). Tenants occupying real property may be taxed even though owner-occupants are not. Ampco Print.-Advs. Corp. v. City of N.Y., 14 N.Y.2d 11 (1964), appeal dismissed for want of a substantial federal question, 379 U.S. 5 (1964).

Decision of Justice Postel, Dated August 10, 1977

Plaintiffs' claim of discriminatory enforcement is also not warranted.

The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. Snowden v. Hughes, 321 U.S. 1, 8 (1944), rehr. den. 321 U.S. 804 (1944); Di Maggio v. Brown, 19 N.Y.2d 283, 289-291 (1967); People v. Friedman, 302 N.Y. 75 (1950), app. dsmd. for want of subst. fed. question, 341 U.S. 907 (1951).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. Charlestown Assn. v. Alderson, 324 U.S. 182, 190-191 (1945), rehr. den. 324 U.S. 888 (1945); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. Mackay Telegraph Co. v. Little Rock, 250 U.S. 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the principle of uniformity. Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 111 (1934), rehr. den. 293 U.S. 632 (1934). The burden of proof is on the taxpayer. (Charlestown Assn. v. Alderson, supra, 324 U.S. 182, 191 [1945]).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.

It merely alleges that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Indeed, the plaintiffs' argument that state and city officials had no objection to a change in the law to exempt circuses is

inconsistent with a claim of intentional or fraudulent discrimination.

Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. Shapiro v. City of New York, 32 N Y 2d 96, 102 (1973), app. dsmd. for want of a substantial fed. question, 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of New York, 14 N.Y.2d 11, 24 (1964), app. dsmd. for want of a substantial fed. question, 379 U.S. 5 (1964).

Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed.

Suffice it to say, the First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S. C. 438, 7 S. E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex. 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959 (1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dsmd. for want of a substantial fed. question 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dsmd. for want of a substantial fed. question 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerpsa, 4 N.Y. 2d 302 (1958), app. dsmd. for want of a substantial fed. question 358 U.S. 39 (1958).

The case of Grosjean v. American Press Co., 297 U.S. 233 (1936), illustrates the kind of tax which is constitutionally objectionable under the First Amendment. In the Grosjean case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information. It spelled this out as follows (pp. 250-251):

> "But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> . . . The tax here involved is bad not because it takes money from the pockets of appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . ."

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes were economic, as were the Governors' vetoes of bills to exempt circuses.

Decision of Justice Postel, Dated August 10, 1977

Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

Accordingly, the defendant's motion for summary judgment is granted to the extent of dismissing the second cause of action. The first cause of action, which seeks a declaratory judgment is not subject to dismissal merely because plaintiffs are not entitled to the declaration which they seek (Lanza v. Wagner, 11 N.Y.2d 317, at 334; James H. Meritt Plumbing, Inc. v. City of New York, 55 A D 2d 552). Therefore, that branch of defendants' cross-motion which seeks dismissal of the first cause of action is denied.

Plaintiffs' cross-motion for summary judgment is disposed of to the extent of adjudging that the plaintiff Circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charges to the circus, and is otherwise denied. In view of the foregoing, plaintiffs' motion for leave to renew and that branch of the defendant's cross-motion which seeks a protective order, are denied as academic.

Settle judgment.

Dated: August 10, 1977

J. S. C.

DECISION OF JUSTICE KIRSCHENBAUM, DATED APRIL 18, 1978

SUPREME COURT: NEW YORK COUNTY SPECIAL TERM: PART I

RINGLING BROS.—BARNUM & BAILEY, COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

KIRSCHENBAUM, J.

Motions under calendar numbers 35 and 36 of March 6, 1978 are consolidated for disposition.

Plaintiffs move for leave to renew and reargue the decision of Mr. Justice Postel dated August 10, 1977. Defendants move for entry of an order, pursuant to CPLR § 9002, upon the decision of Mr. Justice Postel.

In this action for a declaratory judgment, Mr. Justice Postel, now retired, rendered a lengthy decision declaring that plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. (the "Circus") was liable for collection and payment of New York State and City sales taxes on admission charges to the Circus. Insofar as plaintiffs seek reargument, the motion is denied for want of a sufficient showing that the court overlooked or misconstrued any material principles of law or fact.

That branch of plaintiffs' motion which seeks renewal of their argument concerning denial of equal protection and discriminatory enforcement is based upon allegedly "newly discovered events." Specifically, plaintiffs allege that tickets to a Spanish dance and circus arts show entitled "Estrada" which was performed in September 1977, and to the "Big Apple Circus," which was performed during the summer of 1977, and to various ice shows, were not subject to the taxes complained

of. In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she nor the State Tax Commission was aware of the existence of the "Big Apple Circus," a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough (see *Matter of DiMaggio* v. *Brown,* 19 N.Y.2d 283, 290-91; *Matter of G&B Publishing Co., Inc.* v. *Department of Taxation and Finance, Sales Tax Bureau,* 57 A.D. 2d 18, 21, app. den., 42 N.Y.2d 807).

Plaintiffs have submitted additional factual affidavits in support of renewal. Accordingly, leave to renew is granted. However, even considering the additional factual affidavits, the court is unconvinced that Mr. Justice Postel overlooked or misconstrued any material principles of law or fact. Accordingly, on renewal, the court adheres to the decision of Mr. Justice Postel.

Plaintiffs' other arguments are equally without merit. The request by plaintiffs in their reply papers for leave to replead is denied. They have failed to satisfy the court that they have good ground to support their proposed cause of action for alleged discriminatory enforcement against interstate commerce, (see CPLR § 3211 subd. e; *Ati, Inc.* v. *Ruder & Finn, Inc.,* 42 N.Y.2d 454, 461).

In view of this court's granting of renewal, defendants' motion, pursuant to CPLR § 9002, is denied.

Settle order.

Dated: April 18, 1978

.....

J.S.C.

Supreme Court, U. S.
FILED
SEP 4 - 1980
MICHAEL RODAK, JR., CLERK

No. 79-1849

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

vs.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. Respondents State and City tax officials seek to suppress, not answer, Ringling Bros.' Interstate Commerce claim 1

II. The State's selective enforcement and arbitrary application of the admissions tax present issues under the rational basis, strict scrutiny and compelling state interest tests of the Equal Protection clause and under the Due Process and Interstate Commerce clauses of the United States Constitution 5

III. The State Tax Commission's regulations display the irrationality of excluding circuses from the admissions tax exemption for artistic performances . 8

Conclusion 9

CASES CITED:

Boston Stock Exchange v. Tax Commission,
429 U.S. 318 (1977) 2

Carey v. Brown,
48 U.S.L.W. 4756 (U.S. Sup. Ct. Dkt. No. 79-703, June 17, 1980) 9

Herbert v. Lando,
441 U.S. 153 (1979) 8

Metromedia, Inc. v. State Tax Commission,
A.D. 2d , N.Y.S. 2d (3d Dep't, July 10, 1980) 6, 8

Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 3

TABLE OF CONTENTS

CASES CITED:

Raymond Motor Transportation v. Rice,
434 U.S. 429 (1978) 3

Reeves v. State,
48 U.S.L.W. 4746 (U.S. Sup. Ct. Dkt. No. 79-677,
June 19, 1980) 3

Speiser v. Randall,
357 U.S. 513 (1958) 9

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES:

Art. I, §8, cl. 3 ..... 1, 10

Amendment I 8, 10

Amendment XIV, §1 10

REGULATIONS

NEW YORK STATE CODE, RULES AND REGULATIONS:

§527.10(d)(2) 8

ADDENDUM

Addendum A,
Slip Opinion of the Appellate Division in
Metromedia, Inc. v. State Tax Commission A1

Addendum B,
N.Y. Times Article dated Friday, July 11, 1980
Page 68 ..... B1

Addendum C,
N.Y. Times Article dated July 9, 1980 Page C-14 .. C1

TABLE OF CONTENTS

Addendum D,
N.Y. Post Article dated June 27, 1980 Page 33 .... D1

Addendum E,
Program and Ticket Re: "The Big Apple Circus" E1

Neither the New York State Tax Commission nor the City of New York, in their briefs in opposition to Ringling Bros.' petition for a writ of certiorari, respond to the primary issue sought to be raised by petitioners: Whether there was a denial of procedural due process in the actions of the State and City taxing authorities and state courts in granting summary judgment to the State and City on the constitutional claims while denying petitioners discovery or factual hearing on those claims. Instead, the State and City advance several new and untenable grounds for opposing review of their unconstitutional application and enforcement of the admissions tax laws.

I. Respondents State and City tax officials seek to suppress, not answer, Ringling Bros.' Interstate Commerce claim.

Respondent City of New York asserts that Justice Kirschenbaum, who signed the lower state court's final order and judgment, properly refused to permit petitioners to amend their complaint to add a claim under the Commerce Clause of the United States Constitution (art. I, §8, cl. 3), to plead discrimination against interstate commerce in the enforcement of the admissions tax laws. The City asserts that petitioners failed to demonstrate that they had good ground to support their Interstate Commerce claim, advancing two baseless arguments. As shown below, the first argument is factually misleading, and the second reinforces petitioners' claim that this case squarely presents an issue of unconstitutional discrimination against interstate commerce.

Without factual basis, the respondent City contends "The Big Apple Circus" "could hardly be considered in competition with the petitioner Ringling Bros. Circus" and

that the "small, little-known local" nature of "The Big Apple Circus" justified the court below in rejecting petitioners' Interstate Commerce claim.[1]

The City's brief rests on the proceedings in the state courts as showing that the appearance of "The Big Apple Circus" was limited to "a 13-week run in connection with a school for circus performers" which opened in July 1977.[2] In fact, "The Big Apple Circus" continued to perform and appeared in New York City as late as July 27, 1980. Most importantly, after three years of performances in the City and State it continues to enjoy the commercial advantage of not having sales taxes imposed on admissions to its performances.

"The Big Apple's" most recent run received extensive publicity and therefore high commercial visibility. Reviews and articles appeared recently in the *New York Times* and *New York Post* touting "New York's own one-ring extravaganza," and providing the public with detailed information regarding the times, locations and ticket prices of "Big Apple" performances.[3] Far from being the obscure and defunct entity portrayed by respondent City, "The Big Apple Circus" remains an active intrastate enterprise.

The City concedes as a reason for favoring "The Big Apple Circus" over Ringling Bros. Circus that it is "small, little-known [and] local."[4]

As this Court stated in *Boston Stock Exchange v. Tax Commission*, 429 U.S. 318 (1977):

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1. Brief of Respondent City of New York in Opposition to Petition for a Writ of Certiorari, p. 19.

2. *Ibid.*

3. New York Times, July 9, 1980 p. C-14; July 3, 1980, p. C-8 (Addendum, p. C1); New York Post, June 27, 1980, p. 33 (Addendum, p. D1). 1980 Program of "The Big Apple Circus" and ticket stub dated July 27, 1980 (Addendum, p. E1).

4. Footnote 1, *supra.*

> No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959)).[5]

Even without the discovery which State and City tax officials refused to provide, the record shows that they selectively enforced the admissions tax and discriminated against interstate commerce. The chart below shows the crucial facts of the interstate Ringling Bros.' Circus and its untaxed, state-supported, intrastate competitor, "The Big Apple Circus:"

	RINGLING BROS.—BARNUM & BAILEY CIRCUS	"THE BIG APPLE CIRCUS"
Billing	"The Greatest Show On Earth"	New York's "Own Resident Circus Company"
Sites of Performances	Private and municipal arenas under commercial leases.	Government parks and other government lands apparently without payment of rent
Funding	Entirely private	Public support from New York State and City agencies
State of Incorporation	Delaware	New York
Principal Offices	Washington, D.C.	New York, N.Y.

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5. *Compare Reeves v. State*, 48 U.S.L.W. 4746 (U.S. Sup. Ct. Dkt. No. 79-677, June 19, 1980) (state-owned proprietary enterprises may constitutionally discriminate between resident and non-resident customers) *with Raymond Motor Transportation v. Rice*, 434 U.S. 429 (1978) (State Laws and Regulations may not do so).

	RINGLING BROS.—BARNUM & BAILEY CIRCUS	"THE BIG APPLE CIRCUS"
Places of Performance	Throughout the United States and Canada	New York, N.Y.
Acknowledgement of New York Government Support	None	"The Big Apple Circus'" press releases express "Special Thanks" to the Mayor's Office and New York City agencies.
Name and Logo	No local identification	"THE BIG APPLE CIRCUS"; "The Big Apple" being a symbol of The City of New York.
Imposition of the State and City Admissions Tax	TAXED	UNTAXED

The State and City publicly subsidized the intrastate "Big Apple Circus" and apparently provided it with free sites for its performances and then professed ignorance of its existence as a defense to their discriminatory actions. They claimed that no showing of purposeful intent was made yet denied access to the only direct evidence to support this showing. Most surprisingly, they blithely continued to afford a direct competitive advantage to a local New York enterprise by not collecting the admissions tax on its performances while zealously enforcing the same against the interstate Ringling Bros.' Circus.

The City also suggests that Ringling Bros.' Commerce Clause issue was untimely raised. The facts, however, are otherwise. This action was commenced in 1972, but the cross-motions for summary judgment were not submitted until March, 1977, and were *sub judice* in the New York State Supreme Court until May, 1978. "The Big Apple Circus" did not begin performing until July 1977; the

motion to plead the added Interstate Commerce clause issue was made in February, 1978, prior to any judgment having been entered by that court. The claim thus could not have been more timely.[6]

II. The State's selective enforcement and arbitrary application of the admissions tax present issues under the rational basis, strict scrutiny and compelling state interest tests of the Equal Protection clause, and under the Due Process and Interstate Commerce clauses of the United States Constitution.

Throughout this state-court action, Ringling Bros. documented instance after instance of the State's refusal to enforce the admissions tax as against shows virtually identical to petitioners' Circus in musical, choreographic and dramatic content.[7] As indicated by the chart below, there is no rational basis for the selective enforcement of the tax and its exemptions.

	Ringling Bros.-Barnum & Bailey Circus	The Ice Capades	The Big Apple Circus
Musical Director	Yes	Yes	Yes
Costume Designer	Yes	Yes	Yes
Choreographer	Yes	Yes	Yes
Performance Sites	Arenas and other indoor facilities	Arenas and other indoor facilities	Public parks and other public lands

6. Respondent City of New York also contends that repleading the Interstate Commerce issue was procedurally barred. (City's Brief in Opposition, p. 20.) Justice Kirschenbaum of the State Supreme Court did not deny petitioners' application for leave to amend on grounds of timeliness but did so on the merits, finding no "good ground" for its proposed amendment. Petition at A.18a.

7. Additional instances of non-enforcement of the admissions tax against shows similar in content to petitioner's Circus are discussed in Petition, pp. 8-10, 16-17.

	Ringling Bros.-Barnum & Bailey Circus	The Ice Capades	The Big Apple Circus
Choreographed Musical Performances	Yes	Yes	Yes
Admissions Tax Enforced	YES	NO	NO

There is no rational basis, and the State suggests none, for this disparate treatment of petitioner's Circus and similar artistic performances.

The City of New York, however, would have this Court presume a "rational basis," based on incorrectly cited legislative history. The only discussion of any "rational basis" is contained in the following paragraph from the City's brief:

> However, the record below shows that the reason for this exemption was the financial plight of the legitimate theatre and the fear that a further decline in the number of legitimate theatres would seriously affect hotels, restaurants, taxis, garages and other businesses.[8]

This assertion begs the question. That the exemption may have been initially intended in 1961 to benefit the City's legitimate theatre cannot rationalize the State's arbitrary application of the plain language and underlying purposes of the 1965 State law. As stated recently in *Metromedia, Inc. v. State Tax Commission,* A.D. 2d , N.Y.S.2d (3d Dep't, July 10, 1980):

> [The State Tax Commission's] interpretation of that wording, no matter how broad, could never be per-

8. City's Brief in Opposition, p. 9. The City mistakes this "rational basis" by attributing it to the State Legislature when it passed a statewide sales tax in 1965. In fact, this ostensible rationale was advanced by the Mayor of the City of New York in recommending the prior City sales tax on admissions, which was enacted in 1961. Petition, pp. 8-9 n. 6.

> mitted to override the plain language of the statutory exclusion. If a venture correctly denominated an ice show also qualified as a choreographic or musical performance, the regulation could not provide a basis for taxation (the slip opinion is provided in the Addendum A hereto, p. A1.).

The City's incorrect explanation of statutory intent does not justify the differing application of the tax as among artistic performances not classified as "legitimate theatre" or not performed in theatres, particularly when the state statute expressly exempts motion pictures as well as live dramatic, musical or choreographic performances. Furthermore, the City's and state court's assertions that the arena staging of Ringling Bros.' Circus justifies the tax, because arenas can accommodate more patrons, is meritless. The very shows being treated differently are performed in the same or similar arenas. Therefore, since the State's actions fail to satisfy the "rational basis" test under the Equal Protection clause, *a fortiori* these actions also fail to satisfy the "strict scrutiny" and "compelling state interest" tests applied to statutes taxing speech and interstate commerce. *See* Petition, pp. 5-6, 18-20.

The State's circular argument for denying discovery or a hearing on the constitutional claims because Ringling Bros. supposedly failed to show "willful" or "purposeful" discrimination is demonstrated by the heading of the State Tax Commission Brief, Point II (p. 17). This illogical heading reads:

> POINT II—The petitioners have not demonstrated that there has been an arbitrary and discriminatory application of the tax law and therefore is [*sic*] not entitled to discover tax returns and reports of other taxpayers.

The State and City taxing authorities ask this Court to sanction this "Catch-22." They maintain that petitioners

may have no access to the only evidence on the discriminatory intent of the State taxing authorities until they have first proven what only that evidence can show. *See Herbert v. Lando*, 441 U.S. 153 (1979). They then "bootstrap" their case by arguing further that failure to prove discriminatory intent requires dismissal of the constitutional claims.

Respondents' arguments, endorsed by the state courts, present the issue whether this Court should review the curtailment of Equal Protection, Due Process, First Amendment and Interstate Commerce claims by state courts.

III. The State Tax Commission's regulations display the irrationality of excluding circuses from the admissions tax exemption for artistic performances.

The State and City tax officials seek to avoid their selective enforcement and arbitrary application of the admissions tax laws, by pointing to administrative regulations promulgated in 1976, after this action began.[9]

After petitioners filed the petition in this Court, the Appellate Division of the New York State Supreme Court, Third Department, addressed the issue of the effect of the Commission's regulations on the admissions tax in *Metromedia, Inc. v. State Tax Commission, supra.* In holding the "Ice Capades" ice show exempt under the dramatic and musical arts performances exemption, the court refused to give effect to the State Tax Commission's blanket interpretation of the statutory exemption.

Nevertheless, the State and City persuaded the state courts in this case that a circus categorically cannot qualify under the exemption for artistic performances, regard-

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9. New York Codes, Rules and Regulations tit. 20, vol. B, Part 527, effective September 1, 1976. Section 527.10(d)(2), in relevant part, reads: "Charges for admission to dramatic or musical arts performances are excluded from tax. Dramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances."

less of the overwhelming and detailed proof submitted showing its musical, dramatic and choreographic content. Petitioners challenge the State Tax Commission to show any "rational basis" for this disparate treatment of the Ringling Bros.' Circus and the *Metromedia* ice show, as determined by two New York courts.

We urge that the issue presented by the case is whether state agencies and courts may by subjective and irrational considerations determine the taxability of particular forms of artistic expression, and, through explicit tax exemptions and selective tax enforcement, burden or benefit their exercise. *See Speiser v. Randall*, 357 U.S. 513, 518 (1958)[10]; *Carey v. Brown*, 48 U.S.L.W. 4756, 4757 (U.S. Sup. Ct. Dkt. No. 79-703, June 17, 1980).

The impact of the decision below extends far beyond the specific instance of discrimination against the Ringling Bros.' Circus. It grants state and local government unlimited and arbitrary power to favor or penalize particular forms of legitimate artistic expression, by granting or denying tax exemptions.

CONCLUSION

When artistic performances similar to the Ringling Bros.' Circus were found not to be taxed the State and City argued it was because the other performances were

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10. As Mr. Justice Brennan, writing for the Court, noted: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for the speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." 357 U.S. at 518.

not circuses.[11] When a competing circus was found not to be taxed, they argued that they did not know about it, even though they sponsored it. When numerous other instances of non-enforcement were shown and discovery of the direct evidence bearing on the officials' intent was sought, they refused to give this information. Now they seek to profit by arguing that the resulting failure to prove the wrongful intent justified dismissal of the constitutional claims in their entirety. In so doing, the issue is presented whether the State and City violated Ringling Bros.' rights to Equal Protection of the laws, substantive and procedural Due Process under the Fourteenth Amendment, free speech under the First Amendment, and fair, non-discriminatory treatment under the Commerce Clause of the United States Constitution.

Respectfully submitted,

LAWRENCE W. BOES
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New York, New York 10154

Of Counsel
ROBERT THRUN
K. JANE FANKHANEL
ALAN J. KAZANOWITZ
August 29, 1980

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11. In oral argument before Mr. Justice Postel in the State Supreme Court, counsel for respondent Tax Commission stated: "I'll respond to the implication that the defendant State Tax Commission has been engaged in selective enforcement of the State Sales tax. To my knowledge, I am unaware of any such illegality. To put this thing in its proper perspective, the plaintiff may be right. If we exempted one circus from the tax and taxed the plaintiffs [*sic*] on its performance, then I would say there might be a question of selective enforcement, but it is not selective enforcement to tax a circus and exempt some other activity which the statute exempts."

ADDENDUM A

SUPREME COURT

Opinion of the Appellate Division

STATE OF NEW YORK
THIRD DEPARTMENT

METROMEDIA, INC., et al.,

Respondents,

–against–

STATE TAX COMMISSION OF
THE STATE OF NEW YORK,

Appellant.

Argued, May 30, 1980.

Before: HON. MICHAEL E. SWEENEY,
Justice Presiding,
HON. T. PAUL KANE,
HON. ELLIS J. STALEY, JR.,
HON. ROBERT G. MAIN,
HON. JOHN T. CASEY,
Associate Justices.

APPEAL from (1) an order of the Supreme Court at Special Term (DeForest C. Pitt, J.), entered January 26, 1979 in Albany County, which granted plaintiffs' motion

for summary judgment, and (2) the judgment entered thereon declaring that charges for admission to shows presented by plaintiff Ice Capades, Inc. are not subject to tax under articles 28 and 29 of the Tax Law.

ROBERT ABRAMS, Attorney General (Michael F. Colligan and Shirley Adelson Siegel of Counsel), for appellant, The Capitol, Albany, New York 12224.

ROBERTS & HOLLAND (Richard A. Levine of counsel), for respondents, 30 Rockefeller Plaza, New York, New York 10020.

OPINION FOR AFFIRMANCE

KANE, J.

Section 1105 (subd. [f], par. [1]) of the Tax Law imposes a sales tax on "[a]ny admission charge * * * except charges for admission to * * * dramatic or musical arts performances * * *". For the purposes of that tax, the term "dramatic or musical arts admission charge" is defined by another provision to mean a "charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance" (Tax Law, §1101, subd. [d], par. [5]). Plaintiff Ice Capades, Inc., a subsidiary of plaintiff Metromedia, Inc., operates three touring companies which present live shows on ice at various facilities, including one owned by plaintiff Madison Square Garden Center, Inc. The central issue raised by this action is whether the admission charge paid by those who attend such entertainments is subject to the foregoing tax.

Counsel to the New York State Department of Taxation and Finance issued a letter in 1965 in which he opined that Ice Capades' presentations constituted live choreographic performances. His successor was of an opposite view and concluded, in January of 1976, that ice shows were predominantly exhibitions of ice skating skills in which the choreographic or musical aspects were subordinate incidentals. The defendant Tax Commission of the State of New York adopted this later opinion and promulgated a regulation, effective September 1, 1976, specifying that "[d]ramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances." (20 NYCRR 527.10 [d] [2]). Plaintiffs' subsequent request to have this blanket regulation modified proved unsuccessful and the instant action for declaratory judgment was thereafter commenced. Special Term granted plaintiffs' motion for summary judgment and declared, *inter alia,* that charges for admission to shows presented by plaintiff Ice Capades, Inc. are not subject to tax under articles 28 and 29 of the Tax Law. We agree with this determination and affirm its judgment.

Although this action closely resembles the procedural sequence developed in *New York State Cable Tel. Assn.* v. *State Tax Comm.* (59 A D 2d 81), the Court of Appeals has since made it plain that taxing authorities are not foreclosed from changing a prior ruling in a prospective manner (*Matter of National Elevator Ind.* v. *New York State Tax Comm.*, 49 N Y 2d 538, 548). Thus, to the extent that Special Term relied on a presumption arising from defendant's shift in position, its decision is no longer grounded on a supportable premise. Nevertheless, the underlying issues remain the same, for it is axiomatic that defendants may not levy a tax beyond what the law allows;

nor may plaintiffs avoid tax liability unless their productions are factually shown to possess the requisite attributes of exclusion.

The questioned regulation is not objectionable on its face merely because there may be some disagreement over the precise meaning of the term "ice shows". Defendant's interpretation of that wording, no matter how broad, could never be permitted to override the plain language of the statutory exclusion. If a venture correctly denominated an ice show also qualified as a choreographic or musical performance, the regulation could not provide a basis for taxation. While plaintiffs did not request a formal declaratory ruling on whether the regulation applied to their productions, they did ask that it be modified in their favor and furnished a description of their activities. Defendant refused to make any alteration and indicated that Ice Capades' performances were subject to the sales tax. Accordingly, it is readily apparent that the present dispute is not so much concerned with the validity of defendant's regulation as it is with plaintiffs' assertion that their specific productions are live choreographic or musical performances.

Plaintiffs' motion for summary judgment was supported by numerous affidavits from individuals connected with the Ice Capades, which fully detail how such performances are developed and produced. In general, they stress the planning involved in coordinating the movement of skaters with musical scores. Several numbers or routines are combined to form the entire performance, yet each rests on a separately designed pattern of skating which is then integrated with music, scenery, costuming and lighting to produce the desired effect. Defendant's opposing affidavit refuses to concede the expertise of plaintiffs' affiants, but

it does not question the accuracy of their representations. The factual portrayal of these entertainments as live choreographic or musical performances stands uncontested and plainly warranted summary relief. Special Term was careful to restrict its declaration to plaintiffs' current performances, and we do not wish to convey the impression that our affirmance precludes any future reassessment of taxability should there be a change in the structure or nature of those performances.

The order and judgment should be affirmed, with costs.

ADDENDUM B

N.Y. Times Article dated
Friday, July 11, 1980
Page 68

THE NEW YORK TIMES, FRIDAY, JULY 11, 1980 P. C2

Big Apple Circus Bobs Up at Riis Park

"Young Ladies Who Climb to the Top of the Tent! Young Men Who Slide Down! A Dancing Horse, Trained by One of America's Most Extraordinary Horse Trainers! See Apollo, Wonder Dog, Jump 10 Feet in the Air in the Only Trained Greyhound Act in the United States! Laugh at the Clowns! Quake Before the Only Ferocious South Pakistani Soldier Mole in Captivity and His Dread Master, the Great Zakahr! And Many Many More Surprises!"

The Big Apple Circus has come to town, bobbing up this weekend at Jacob Riis Park in Rockaway, Queens, where it will play through next Tuesday.

It's 8 A.M. Faint stirrings are heard from the three circus trailers parked beside the circus tent. A fluting soprano voice is heard from the trailer marked "Ethel and Her Greyhounds," where Ethel Jennier, her three pet dogs, 10 trained greyhounds and husband, Horst, make their home. A few yards away, where the trailer legend reads "Lady Abigail and Her Dancing Horse," Abigail Allen is easing an electric shaver over the glowing chestnut muzzle of her horse, Sundance, before taking him out for his morning jog and feast of grass — "His pleasure trip before he warms up for the show," Miss Allen explained. Outside the biggest trailer a lacy white costume shirt flutters from a laundry line above a neat pile of plastic toy trucks. Inside, 6-year-old Vlastimir Bertini is eating breakfast with his father and mother, Vlastimil and Helena, and his uncle Sasha, all part of a daredevil Czechoslovak unicycle and balancing act.

Therapist, Juggler and Clown

In the distance a first few bathers and picnickers straggle across the dunes to the nearby beach in a silence broken only by mourning doves and a cheeping baby bird. Back in Manhattan, Big Apple Circus city dwellers are converging on the Golden Donut luncheonette like overgrown and obscurely zany campers. Soon the first car pulls up and performers tumble out. Paul Binder, a Gestalt therapist turned street juggler and "Sesame Street" clown, scans the still sky. "Morning, Benny," he says, addressing a fuzzy dog curled up at the tent flap.

Inside the big tent, the ring crew rakes the sawdust before laying down red carpeting and hurriedly hoists the wood triangles that, slotted together, will form the brightly painted pie of a floor on which the second act takes place. A member of the Back Street Flyers, a fearless team of six black teen-age tumblers and gymnasts trained at the Manhattan-based Big Apple Circus School, straggles by, the laces of his red sneakers trailing in the dust. "Morning, Benny," he, too, calls sleepily.

Michael Christensen, co-founder with Mr. Binder of Big Apple, and Karyn Kinder, its wardrobe mistress, were married in the big tent the night

before, and the circus performers are still feeling the effects of the wedding celebration.

The smaller, gaily striped dressing-room tent is beginning to fill up now. Dale Scott, a clown wire walker, doodles on her flute then rummages around in a tattered shopping cart, securing props for her bag-woman act. Nathalie Enterline, a second generation baton twirler and 1978 world champion, whose innocent air is reminiscent of a young Eleanor Powell, gathers up her gear and wanders out into the fields to zip through her tosses, rolls and spins, batons flashing in the sun.

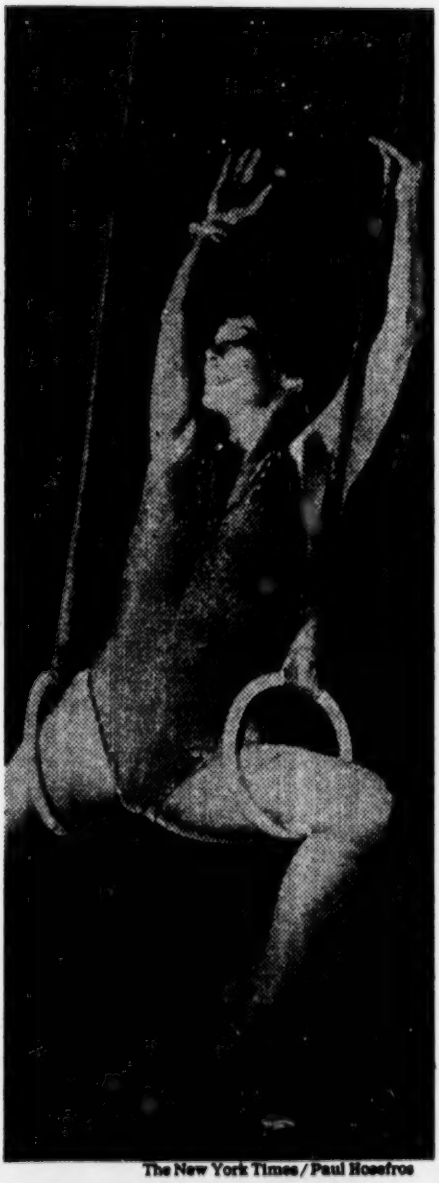
Trained the Cast of 'Barnum'

Across the tent, Mr. Binder and Mr. Christensen ease on their duck's-foot shoes and suspendered pantaloons. Juggling and clowning their way across Europe, the two discovered a mutual interest in the old-style, one-ring circus on which the three-year-old Big Apple is modeled. They have drawn to it a number of refugees from the razzle-dazzle Barnum and Bailey tradition. They have also trained the cast for the Broadway musical "Barnum."

Intimacy is the chief virtue of the one-ring circus. At Big Apple, no one sits farther than 18 feet from the ring. "What does 'small' mean?" Mr. Christensen asked rhetorically. "It means you see the sweat, smell the sawdust and hear the apparatus noises. I guess it's kind of corny, but it means an energetic union of performer and audience."

Mr. Binder nodded in agreement. "You can focus on the craft of the individual performer," he said. "There are very few performers who wouldn't prefer to work a one-ring circus. All the great world circuses have been one-ring, but counting the Big Apple and the Pickle Brothers on the West Coast, there are only about five one-ring circuses in operation in the United States today."

In another corner, Paul Lubera, whose exultant grace on the high trapeze changes to slight sadness on the



The New York Times / Paul Hosefros

Suzanne Perry, the Big Apple Circus's expert on the Spanish Web and airborne Roman Rings, this weekend at Jacob Riis Park in Queens.

ground, daubs on his makeup. There is a burst of calliope music outside. "I love tent shows," Mr. Lubera says. "Except when it gets hot. You're up in the air and heat rises." Suzanne Perry, the Big Apple's sultry expert on the Spanish Web and airborne Roman Rings, drifts by.

Out in the field, the popcorn and cotton-candy machines are given their morning cleaning. Rosalind Rojas flips through a couple of midair somersaults in the big tent. A line has formed at the Heavenly Zephyr, a multicolor circus-wagon box office that looks as if it had been designed by Alexander Calder, Red Grooms and Rube Goldberg. A small boy darts away from his grandfather and tries to wedge himself through the wooden fence surrounding the circus.

Mr. Binder peers through the back flap as the audience files in, scanning it, perhaps, to get an idea which children and adults he may select later to help conduct the circus band. Little Vlasto, a demon peddler on the unicycle, tosses a Frisbee in the fields with a groundsman, unconcerned about his coming act.

Assembling in Their Finery

As if by silent signal, the performers begin to assemble in their circus finery. Miss Jennier is all quivering orange and yellow feathers. Miss Enterline is in blue sequins. Lady Abigail sits astride Sundance in a flowing red gown and black mantilla. A purple cape, spangled with silver, hangs from a tent rope.

Michael Moschen, the ringmaster, checks the seams of a tear-away frock-coat that will later magically transform him into a master juggler. Tisha Tinsman and Suzette Michaud limber up, using a trailer ladder for their barre, as Mr. Bertini, his bluff face uncharacteristically solemn, checks the 30-foot-high poles he will use in the Perch and Due Helena acts.

Benny, small and gray, dashes into the ring but retreats guiltily as the children cheer. "Places! Places, please for the Charivari!" Mr. Moschen calls out. The band strikes up a raucous march, then a fine ironic blast of Dixieland jazz as, one by one, the performers slip through the red velvet curtains and disappear. The Big Apple Circus has begun.

The Big Apple Circus can be seen at Jacob Riis Park today at 4 and 7:30 P.M., tomorrow at 10:30 A.M. and 4 and 7:30 P.M. and Sunday at 1 and 4 P.M. Tickets are $5 and $7.50; $3.50 and $4.25 for children. For information on travel and the circus schedule through July, call 369-5112 or 5113.

ADDENDUM C

N.Y. Times Article dated
July 9, 1980
Page C-14

Circus: The One-Ring Big Apple

N.Y. TIMES, July 9, 1980 p. C-14

By JENNIFER DUNNING

FROM the first toot of the trumpet to the last clown's wave, the Big Apple Circus is fun of a different kind. Founded three years ago in an attempt to revive the old one-ring tradition in New York, this circus has its animal acts and pretty girls, its clowns and aerialists. But the emphasis at Big Apple, seen Friday at Great Kills Park, S.I., is on more than spectacle. Both failures at attempted feats and moments of daring accomplishment are there for the spectator to absorb in intimate surroundings.

The Bertini Family, a Czechoslovak unicycling act, comes closest to both circus traditions. Mother Bertini may ride upended in a split, perched midair between the fast-pedaling Father and Uncle Bertini, or vault on to Father Bertini's shoulders from a teeter board. Baby Bertini may zigzag through a slalom course of bright feathered quills on a unicycle almsot as tall as he. But a kind of charming Gallic insouciance pervades the act, making of it something more than simple circus daredevilry.

•

The Back Street Flyers bring the brash rhythms of the street into the circus tent. Six young men, trained at the Big Apple Circus School, sailed through high multiple flipflops and form a perilous human ladder into the sky, all with nonchalant grins. Suzanne Perry swings lazily through a pair of rings, and then spins with reckless speed at the top of the tent. Nathalie Enterline, a world champion baton twirler, ripples batons through the air and over the contours of her body with easy pizzazz.

Seven greyhounds leap over high barriers with consummate grace, and a small, fuzzy clown dog squeezes under with comic hesitation, all presided over by the giddy little Ethel Jennier and her dour, handsome assistant. And Abigail Allen dreamily guides her horse, Sundance, through a Spanish-flavored dressage number that includes, for the balletgoers in the audience, a pas de cheval or two.

The Big Apple's strongest suit is its intimacy, and the delicate fantasy, inventiveness or personalities that shine through the acts. Dale Scott's bad lady clown skids wistfully along a tightrope, traveling in a battered frying pan. Paul Binder gently plucks a couple of children and an indulgent grandfather out of the audience, one by one, to conduct the circus band, in an act that is living theater.

The audience is as skillfully drawn into a park scene for two clowns, Michael Christensen and Jimmy Tinsman. Mr. Christensen's hilarious play-

Under the Big Top

THE BIG APPLE CIRCUS, directed by Paul Binder; produced by Mr. Binder and Judith Friedlaender; producing clown, Michael Christensen; ringmaster, Michael Moschen; musical director, Rik Albani; lighting designer, Jan Kroeze; principal costume designer, Paul Guzzetta. Presented by the New York School for Circus Arts Inc.

At Jacob Riis Park, Breezy Point, Queens, off Beach Channel Drive, Friday through Tuesday; Floyd Bennett Field, Jamaica Bay, Brooklyn, off Flatbush Avenue, July 19-27.

ing of the Amazing Zakahr, fearless subduer of the death-dealing Southern Pakistani Soldier Mole, had a few timid audience members scrambling from their ringside seats. And Michael Moschen, the dark-eyed and mysterious young Ringmaster, performs a three-ball juggling act that comes close to dance and a fire-juggling number that looks like unadulterated magic.

•

But it is in Paul Lubera's ringtop trapeze act, perhaps, that Big Apple's peculiar mix of poignancy and flamboyance comes most instantanously alive. Mr. Lubera has the look of St.-Exupéry's Little Prince returned, a little gaudy and buffeted by time, who loses that grave look in a heart-stopping, free-floating trip through the upper air.

The witty Big Apple band and fast-moving ring crew are almost a show in themselves. It all will move to Jacob Riis Park in Queens on Friday.

ADDENDUM D

N.Y. Post Article dated June 27, 1980 Page 33

N.Y. POST June 27, 1980 p. 33

Post Picks

Home-grown circus back in town

THE CIRCUS is coming! New York's own one-ring extravaganza, The Big Apple Circus, is performing this weekend at Great Kills Park, Staten Island.

Comic jugglers, tumblers, trapeze artists and prancing greyhounds are part of the circus, which is conceived in the European tradition of a more intimately-scaled company in which performers are considered artists. Each show runs appromixately two hours, taking place in the Circus' one-ring tent that seats almost 1000 spectators but still allows for an intimate atmosphere.

The circus will also perform at Great Kills Park July 1-6; at Jacob Ellis Park in Queens, July 11-15; and at Floyd Bennett Field in Brooklyn, July 19-27 (except July 21).

Tickets are priced from $3.50 to $4.25 for children and $5 and $7.50 for adults. Today's shows are at 1 and 7:30, tomorrow at 1,4, and 7:30 and Sunday at 1 and 4. For information call 369-5112.

— SUSAN FRIEDLAND

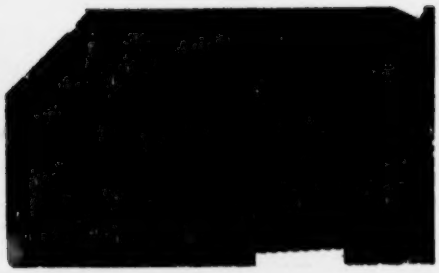
Members of the Big Apple Circus in action.

ADDENDUM E

Program and Ticket
Re: "Big Apple Circus"

The New York School for Circus Arts, Inc.
presents

BIG APPLE CIRCUS



Summer 1980

at GATEWAY NATIONAL RECREATION AREA

Produced by
Paul Binder & Judith Friedlaender

Producing Clown
Michael Christensen

Musical Director
Rik Albani

Ringmaster
Michael Moschen

Lighting Designer
Jan Kroeze

Principal Costumes Designed by Paul Guzzetta

Directed by **Paul Binder**

PROGRAM

CHARIVARI ..... *Entire Company*
BATON SALUTE ..... *Nathalie Enterline*
SPANISH RIDING ..... *Abigail Allen & Sundance*
JUGGLING CLOWNS..... *Paul Binder & Michael Christensen*
POWER ACROBATICS..... *The Back Street Flyers**
THE AMAZING ZAKAHR ..... *Zakahr & Gittha*
HIGH BALANCE PERCH ..... *Due Helenas*

INTERMISSION

CLOWN WIRE WALKING ..... *Dale Scott*
HIGH-JUMPING DOGS ..... *Ethel Jennier & Her Greyhounds*
SPANISH WEB & ROMAN RINGS..... *Suzanne Perry*
JUGGLING & TORCH SWINGING .... *Michael Moschen*
UNICYCLES & TEETERBOARD..... *The Bertini Family***

*The Back Street Flyers: Steven Johnson, Darryl Hamilton, Wayne Jones, Abel Shark, Nathaniel Suares, Andre Valdez III

**With Suzette Michaud & Tisha Tinsman

Company Swing..... Rosalinda Rojas

Program subject to change at the discretion of the Director.

WITH
THE BIG APPLE CIRCUS BAND

Drums .....Joe Ham
Piano .....Linda Rose
Reeds.....Fred Vigdor
Trombone...Curtis Foulkes
Trumpet ....Rik Albani

PRODUCTION BY

William Konkoy—*General Manager*
Robert Libbon—*Production Manager*
Phil Crowder—*Canvas Master & Chief Rigger*

Master Electrician—Gail Dahl
Ring Crew—Rob Libbon, Chief; Phil Beder, Warren Dowdy, Nelson Howe, Grant Phillips
Property Superintendents—Sam Buccio, Jim Wintner
Production Assistant—Nina Lightstone
Assistant Electrician—Wendy Chapin
Follow Spot Operator—Jim Tinsman
Box Office Manager—Erik Haagenson
House Manager—Ruth Kidder
Box Office Staff—Eric Fitzgerald & Scott Holder
Grounds Crew—Joseph Killeen

PRODUCTION SUPPORT FROM

Press Agent—John Springer Associates
Promotion—The Burenga Agency
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Photography—Peter Angelo Simon
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Video Ad Production—Sandbox Audio-Video Ltd.
Video Production Facilities—National Video Center
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Rigging—Harold Dessau Hardware, Hylan Hardware, Joe's Rope Shop
Tickets—National Ticket Company
Printing—Ad Centive, JLS Printing, Speedolite, Wintry Press (assistance by Con Edison)
Special Promotion—Michael Rosenberg
Postering—Jimmy Rogers
Signs—Theatre Machine Scenic Shop
Banner—Peg Leg Productions
Travel Arrangements—Holiday Travel
Audit Services—Lutz & Carr
Back Tent—Ace Canvas & Tent
Site Security—Burns International Security
Insurance—Penn General Agencies, R.A. Boyar

For Ticket Information, call (212) 369-5112

BIG APPLE CIRCUS

T-SHIRTS!!!

Enclosed is my check (to the Big Apple Circus) in the amount of $_____.

Please send my order (sizes checked below) to:

Name _____

Street _____

The Big Apple Circus is a professional performing company of the New York School for Circus Arts. We present it to you for your pleasure and for ours, and because we cannot imagine a professional circus school without a living performing circus. Many of the acts of the Summer of 1980 Big Apple Circus show were originally trained in our school, and many of our performers continue to serve on our faculty.

We are the only publicly funded school for circus arts in the United States. We offer classes in a range of circus skills in several different programs. Under the auspices of the ArtsConnection, another non-profit organization, we participate in a program through which we audition children in selected New York City Public Schools and select talented inner-city children for training in acrobatics. In another program of our school, we have recently completed training in circus arts of the entire cast of the Broadway musical "Barnum."

Circus has been called the "theater of aspirations." We have founded our circus here in New York City because it is our home, and because it is the city of aspirations where many people come to realize their dreams. Our dream is to have a permanent performing company based in New York, to tour that company throughout the United States and abroad, and, through it, to introduce Americans to a unique and ancient art form—the one-ring circus. The Big Apple Circus is part of that dream. We dedicate it to New York City, to our aspirations and to yours.

THE NEW YORK SCHOOL FOR CIRCUS ARTS, INC.

Judith Friedlaender ..... *Executive Director*

Paul Binder ..... *Artistic Director*

Alexandre Pavlata ..... *Master Teacher*

William Konkoy &
Ronald B. Monroe ..... *Administration*

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We wish to acknowledge the enormous assistance and cooperation of Gateway National Recreation Area, and specifically to thank:

Herbert S. Cables, Jr., *Superintendent*
John Guthrie, *Deputy Superintendent*
Sam Holmes, *Chief of Interpretation & Recreation*
Jim Reinhardt, *Office of Community Outreach*
Manny Strumpf, *Office of Public Information*
Robert Cunningham, *Assistant Superintendent for the Breezy Point/Jamaica Bay Unit*
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The United States Park Police and the many others at Gateway who have helped make our 1980 season possible.

CONTRIBUTORS

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